

NORTH CAROLINA  
COURT OF APPEALS  
REPORTS

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2016

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CASES  
ARGUED AND DETERMINED IN THE  
**COURT OF APPEALS**  
OF  
NORTH CAROLINA  
AT  
RALEIGH

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LUCILLE CROSSMAN, AS ADMINISTRATOR OF THE ESTATE OF LIONEL CROSSMAN,  
DECEASED, PLAINTIFF-APPELLEE  
v.  
LIFE CARE CENTERS OF AMERICA, INC.; DEVELOPERS INVESTMENT COMPANY,  
INC.; LIFE CARE MANAGEMENT, LLC; HENDERSONVILLE MEDICAL INVESTORS,  
LLC; AND MICHELLE MORROW, DEFENDANTS-APPELLANTS

No. COA12-702

Filed 15 January 2013

**Arbitration and Mediation—arbitration agreement—unenforceable—failure in material terms**

The trial court did not err in a case involving an agreement to arbitrate by denying defendant’s motion to dismiss and to compel arbitration. The agreement was unenforceable because it was impossible to perform due to a failure in its material terms.

Appeal by Defendants from orders filed 24 January and 7 February 2012 by Judge Eric L. Levinson in Henderson County Superior Court. Heard in the Court of Appeals on 25 October 2012.

*Smith Moore Leatherwood LLP, by Terrill Johnson Harris and Elizabeth Brooks Scherer, for Defendants-Appellants.*

*Connor & Connor, LLC, by Kenneth L. Connor, for Plaintiff-Appellee.*

STEPHENS, Judge.

**CROSSMAN v. LIFE CARE CTRS. OF AM., INC.**

[225 N.C. App. 1 (2013)]

*Facts and Procedural History*

On 14 January 2011, while serving as administrator of her husband's estate, Ms. Lucille Crossman ("Ms. Crossman") filed a wrongful death complaint against Life Care Centers of America, Inc., Developers Investment Company, Inc., Life Care Management, LLC, Hendersonville Medical Investors, LLC, and Michelle Morrow, (collectively, "Defendants") in Henderson County Superior Court. Defendants own, operate, and manage Life Care Center of Hendersonville ("Life Care" or "the Facility"). The basis of Ms. Crossman's complaint centered on the medical care given Mr. Lionel Crossman ("Mr. Crossman") from 5 July 2007 through 5 March 2009, while he resided at Life Care.

In the year 2000, Mr. Crossman suffered a stroke while on vacation in Florida with Ms. Crossman. That event left him partially paralyzed and with limited communication ability. Despite these physical limitations, Mr. Crossman's mental capacity and decision-making ability remained "cognitively intact," and he continued to live at home with his wife until May of 2004. At that time, Mr. Crossman could no longer remain at home and entered Life Care as a full-time resident. Upon entry, he signed a document entitled "Voluntary Agreement for Arbitration" ("the Arbitration Agreement" or "the Agreement"), which stipulated that the parties agreed to submit all claims arising out of the care and treatment of Mr. Crossman at Life Care to binding arbitration. The Agreement also specified that such disputes would be handled via an arbitration hearing "before a board of three arbitrators selected from the American Arbitration Association ("AAA")" and that the arbitrators would apply the applicable rules of the AAA. The Agreement was not signed by Ms. Crossman.

Mr. Crossman remained at Life Care until 5 March 2009 when he was discharged to the hospital. One week and six days later, on 18 March 2009, he died under hospice care. Ms. Crossman alleges ordinary and medical negligence, fraud, willful and wanton conduct, and unfair and deceptive trade practices on the part of Defendants, claiming that their actions and inaction as caretakers occurring between 5 July 2007 and 5 March 2009 were, together, the proximate cause of Mr. Crossman's injuries<sup>1</sup> and eventual death.

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1. The injuries allegedly suffered by Mr. Crossman while a resident at Life Care include malnutrition, dehydration, hyponatremia, metabolic encephalopathy, pain and suffering, mental anguish, physical decline, disfigurement, physical impairment, and loss of enjoyment of life.

**CROSSMAN v. LIFE CARE CTRS. OF AM., INC.**

[225 N.C. App. 1 (2013)]

On 23 February 2011, Defendants filed a motion to dismiss the case and to compel arbitration based on the Agreement, signed by Mr. Crossman when he entered the Facility in May of 2004. On 9 June 2011, the trial court filed an order denying Defendants' motion and requiring the parties to complete discovery as "to the existence of an enforceable agreement to arbitrate." The order halted all discovery on the merits of Ms. Crossman's allegations until the arbitration controversy was resolved. Discovery on the arbitration matter ensued, and the trial court held an evidentiary hearing concerning Defendants' motion to dismiss and compel arbitration on 7 November 2011.

On 24 January 2012, the trial court filed an order denying Defendants' motion to dismiss and to compel arbitration. The Honorable Eric L. Levinson ("Judge Levinson"), Superior Court Judge presiding, found no basis on which to enforce arbitration of the claims made by Ms. Crossman. Despite Mr. Crossman's established capacity to enter into the Arbitration Agreement on his own behalf, the court concluded that the Agreement was unenforceable because (1) it was impossible to perform due to a failure in its material terms, and (2) arbitration agreements signed by decedents do not bind wrongful death beneficiaries. Two weeks later, on 7 February 2012, Judge Levinson filed an order denying Defendant's motion to reconsider. Defendants filed notice of appeal on 22 February 2012.

*Standard of Review*

"[A]n appeal from an order denying arbitration, although interlocutory, is immediately appealable because it involves a substantial right which might be lost if appeal is delayed." *HCW Ret. & Fin. Servs., LLC v. HCW Employee Benefit Servs., LLC*, \_\_\_ N.C. App. \_\_\_, \_\_\_, 731 S.E.2d 181, 185 (2012) (internal quotation marks omitted). "The standard governing our review of this case is that 'findings of fact made by the trial judge are conclusive on appeal if supported by competent evidence, even if . . . there is evidence to the contrary.' . . . 'Conclusions of law drawn by the trial court from its findings of fact are reviewable *de novo* on appeal.'" *Tillman v. Commercial Credit Loans, Inc.*, 362 N.C. 93, 100-01, 655 S.E.2d 362, 369 (2008) (quoting *Lumbee River Elec. Membership Corp. v. City of Fayetteville*, 309 N.C. 726, 741, 309 S.E.2d 209, 219 (1983) and *Carolina Power & Light Co. v. City of Asheville*, 358 N.C. 512, 517, 597 S.E.2d 717, 721 (2004)).

**CROSSMAN v. LIFE CARE CTRS. OF AM., INC.**

[225 N.C. App. 1 (2013)]

*Discussion*

Defendants argue the trial court committed reversible error in denying their motion to dismiss and to compel arbitration on grounds that (1) Ms. Crossman, as a beneficiary of Mr. Crossman's estate, is bound by the Agreement, and (2) the Agreement is not rendered unenforceable by the AAA's policy on healthcare arbitration. We first address whether the Agreement is enforceable at all, given the AAA's policy on healthcare arbitration.

Effective 1 January 2003, the AAA issued a Healthcare Policy Statement ("the Policy Statement") which informed all potential parties to an arbitration agreement arising in the field of healthcare that it would "no longer accept the administration of cases involving individual patients without a post-dispute agreement to arbitrate."<sup>2</sup> In this case, Mr. Crossman signed the Agreement before the dispute arose. Because the Agreement stipulated that arbitration must occur under the rules and procedures of the AAA and be presided over by arbitrators selected from persons approved by the AAA, the trial court determined that the Agreement was unenforceable as impossible to perform due to a failure in material terms.

At the outset, we note that "North Carolina has a strong public policy favoring arbitration." *Raper v. Oliver House, LLC*, 180 N.C. App. 414, 419, 637 S.E.2d 551, 554 (2006). That policy is subject, however, to "[t]he essential thrust of the Federal Arbitration Act, which is in accord with the law of our [S]tate, . . . to require the application of contract law to determine whether a particular arbitration agreement is enforceable[,] thereby placing arbitration agreements upon the same footing as other contracts." *See id.* (internal quotation marks and citation omitted); *see also Futrelle v. Duke University*, 127 N.C. App. 244, 248, 488 S.E.2d 635, 638 (1997) ("It is essential that parties to an arbitration specify clearly the scope and terms of their agreement to arbitrate as enforcement of arbitration agreements is not subject to less scrutiny than the enforcement of other agreements."). "An [arbitration agreement] is valid, enforceable, and irrevocable except upon a ground that exists at law or in equity for revoking a contract." N.C. Gen. Stat. § 1-569.6 (2011). A contract is unenforceable due to impossibility "if the subject matter of the contract is destroyed without fault of the party seeking to be excused from performance." *Brenner v. Sch. House, Ltd.*, 302 N.C. 207, 210, 274 S.E.2d 206, 209 (1981).

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2. The Statement can be found at the following uniform resource locator: [http://www.adr.org/aaa/ShowPDF?doc=ADRSTG\\_011014](http://www.adr.org/aaa/ShowPDF?doc=ADRSTG_011014).

## CROSSMAN v. LIFE CARE CTRS. OF AM., INC.

[225 N.C. App. 1 (2013)]

Defendants advance three reasons for maintaining that the Arbitration Agreement can be properly performed without employing the AAA. First, they argue that “the only difference [resulting from the Policy Statement] is that the arbitrators would not be chosen from an *official* panel of AAA arbitrators,” primarily citing to an opinion of this Court in *Westmoreland v. High Point Healthcare Inc.*, \_\_\_ N.C. App. \_\_\_, \_\_\_, 721 S.E.2d 712 (2012). Defendants contend that “[n]othing prevents the parties or the trial court from requiring that the selected arbitrators be on the AAA’s roster.” We disagree.

In *Westmoreland*, we addressed the validity of a pre-dispute arbitration agreement signed upon admittance to a nursing facility. *Westmoreland*, \_\_\_ N.C. App. at \_\_\_, 721 S.E.2d at 715. In pertinent part, the agreement stipulated that any arbitration occurring as a result of that agreement must follow the rules of the AAA and “[t]he arbitration proceeding shall be conducted before one neutral arbitrator selected in accordance with the rules of the AAA.” *Id.* at \_\_\_, 721 S.E.2d at 719. The trial court in *Westmoreland* ruled that the arbitration agreement was “both procedurally and substantively unconscionable,” in part on grounds that it was impossible to perform. *Id.* at \_\_\_, 721 S.E.2d at 715. We reversed that order and determined, *inter alia*, that the agreement was not impossible to perform, despite the existence of the Policy Statement, because “[it] did not provide that a AAA arbitrator must be used to conduct the arbitration. . . . [and the Policy Statement] simply meant that the arbitration could not be conducted under the auspices of the AAA.” *Id.* at \_\_\_, 721 S.E.2d at 719-20. In so holding, we cited to a decision of the Supreme Court of Alabama, which had determined under similar factual and procedural circumstances that the Policy Statement “did not preclude arbitration of the claims by a non-AAA arbitrator.” *Id.* at \_\_\_, 721 S.E.2d at 719 (*citing Blue Cross Blue Shield of Ala. v. Rigas*, 923 So.2d 1077, 1092 (Ala. 2005) (“[T]he statement of the AAA provides only that the AAA will not administer a dispute such as this one; it does not provide that [the Appellee’s] claims are not arbitrable.”)). That rationale is not applicable here.

The Arbitration Agreement in this case reads:

An arbitration hearing arising under this Arbitration Agreement *shall be held . . . before a board of three arbitrators selected from the American Arbitration Association . . .* In conducting the hearing and all other proceedings relative to the arbitration of the claim(s),

## CROSSMAN v. LIFE CARE CTRS. OF AM., INC.

[225 N.C. App. 1 (2013)]

the arbitrators shall apply the applicable rules of procedure of the AAA.

(Emphasis added). The language used here is different from that employed in *Westmoreland*. Here, the parties specifically require the use of “arbitrators selected from the American Arbitration Association.” This language indicates the parties’ intention to arbitrate under the auspices of the AAA, unlike the procedure contemplated in *Westmoreland*. By requiring the selection of AAA arbitrators, the Agreement sought to employ an organization that refuses to be so employed. This requirement constitutes an integral and material provision of the Agreement. Accordingly, we hold that the Agreement is unenforceable as impossible to perform.

Defendants contend, second, that even if the Agreement requires arbitrators from the AAA, it is saved by N.C. Gen. Stat. § 1-569.11 because that section “requires the parties to follow the agreed upon method of choosing arbitrators ‘unless the method fails.’” We are not persuaded. Section 1-569.11(a) requires the court to appoint an arbitrator if the parties to an agreement to arbitrate agree on a *method* for appointing an arbitrator and that method fails. N.C. Gen. Stat. § 1-569.11(a) (2011). The issue in this case does not revolve around the *process* of selecting a particular arbitrator, but rather the *unavailability* of a pool of arbitrators who have been mandated by the Agreement. Thus, we conclude that the statute does not apply.

Third, and lastly, Defendants argue that the Agreement contains a severability clause, which saves any defect as to the selection of AAA arbitrators or use of AAA procedures. We disagree and note that “[s]evering the unenforceable provisions of the arbitration clause at issue in the instant case would require the Court to rewrite the entire clause, and we decline to do so here.” *Tillman*, 362 N.C. at 108, 655 S.E.2d at 373.

Therefore, we affirm the trial court’s conclusion that “[t]hese provisions were important, integral, and material terms of the agreement to arbitrate and the impossibility of performing these terms render the Arbitration Agreement unenforceable.” Because the Agreement is unenforceable as impossible to perform, we need not address Defendants’ further contention that Ms. Crossman is bound by Mr. Crossman’s assent to the Arbitration Agreement as his beneficiary.

AFFIRMED.

Judges GEER and McCULLOUGH concur.



**DOCRX, INC. v. EMI SERVS. OF N.C., LLC**

[225 N.C. App. 7 (2013)]

DOCRX, INC., PLAINTIFF-APPELLANT

v.

EMI SERVICES OF NC, LLC, DEFENDANT-APPELLEE

No. COA12-783

Filed 15 January 2013

**Judgments—motion to enforce foreign judgment—Rule 60—Full Faith and Credit Clause—grounds for postjudgment relief**

The trial court erred by denying defendant's motion to enforce an Alabama judgment pursuant to the Uniform Enforcement of Foreign Judgments Act under N.C.G.S. §§ 1C-1701 to -1708 based on the grounds of intrinsic fraud, misrepresentation and misconduct. In North Carolina, the remedies available under N.C.G.S. § 1A-1, Rule 60 are limited by the Full Faith and Credit Clause of the United States Constitution for a foreign judgment. Postjudgment relief from foreign judgments under Rule 60(b) is limited to the following grounds: (1) the judgment is based upon extrinsic fraud; (2) the judgment is void; or (3) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application.

Appeal by Plaintiff from order entered 6 February 2012 by Judge W. David Lee in Superior Court, Stanly County. Heard in the Court of Appeals 27 November 2012.

*Henson & Talley, LLP, by Karen Strom Talley and Perry C. Henson, Jr., for Plaintiff-Appellant.*

*Chapman Law Group, PLC, by Avery S. Chapman; and Jackson & McGee, LLP, by Sam McGee and Gary W. Jackson, for Defendant-Appellee.*

McGEE, Judge.

DOCRX, Inc. (Plaintiff) appeals from an order denying its motion to enforce a foreign judgment pursuant to the Uniform Enforcement of Foreign Judgments Act, N.C. Gen. Stat. §§ 1C-1701 to -1708. For the reasons below, we vacate the order and remand for further proceedings.

The undisputed facts are that Plaintiff filed a Request To File Foreign Judgment in Superior Court in Stanly County on 2 August

2011. Plaintiff presented a certified copy of a default judgment order (the Alabama judgment) entered against EMI Services of North Carolina, LLC (Defendant) in the amount of \$453,683.14, on 1 April 2011 in the Circuit Court of Mobile County, Alabama. Defendant filed a Motion For Relief From And Notice Of Defense To Foreign Judgment on 25 August 2011. Defendant argued, *inter alia*, that the Alabama judgment was obtained by extrinsic fraud. Plaintiff filed a motion to dismiss Defendant's defense of extrinsic fraud pursuant to N.C. Gen. Stat. § 1A-1, Rule 12(b)(6). Plaintiff also filed a Motion To Enforce Foreign Judgment As A North Carolina Judgment on 2 December 2011. Defendant filed an Amended Motion For Relief From And Notice Of Defense To Foreign Judgment on 17 January 2012, and altered its motion by adding a request for relief from the judgment based on fraud, pursuant to N.C. Gen. Stat. § 1A-1, Rule 60(b). The trial court heard the matter on 30 January 2012, and entered an order on 6 February 2012 denying Plaintiff's motion to enforce the Alabama judgment as a judgment of the State of North Carolina. Plaintiff appeals.

On appeal, Plaintiff raises the issue of whether the trial court erred in denying Plaintiff's motion to enforce the Alabama judgment as a judgment of North Carolina. In its order, the trial court first determined that the affidavits and exhibits submitted by Defendant supported Defendant's argument that Plaintiff obtained the Alabama judgment as a result of fraud. The trial court then determined that N.C. Gen. Stat. § 1C-1703(c) entitled Defendant to raise against enforcement of the Alabama judgment "the same defenses as a judgment of this State[.]" The trial court then stated that relief under N.C. Gen. Stat. § 1A-1, Rule 60(b) was available if the trial court determined that "there was "fraud (whether heretofore denominated *intrinsic* or *extrinsic*), misrepresentation, or other misconduct of an adverse party." Finally the trial court concluded that:

This [c]ourt concludes that in accordance with NCRCP 60(b)(3) the intrinsic fraud, misrepresentation and misconduct of . . . [P]laintiff in obtaining the underlying Alabama judgment precludes enforcement of the Alabama judgment as a judgment of this State.

The appellate courts of our State have not yet addressed the nature of the relationship between the Full Faith and Credit Clause and N.C. Gen. Stat. § 1A-1, Rule 60(b). Traditionally, foreign judgments have been subject to attacks on limited grounds:

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North Carolina may set aside another state's judgment, *but only where it is shown that the court lacked jurisdiction, or that the judgment was procured through fraud.* *Thomas v. Frosty Morn Meats, Inc.*, 266 N.C. 523, 146 S.E.2d 397 (1966). The type of fraud which must be alleged in order to attack a foreign judgment is *extrinsic fraud.* *Horn v. Edwards*, 215 N.C. 622, 3 S.E.2d 1 (1939). The general rule is that

[e]quity will not interfere in an independent action to relieve against a judgment on the ground of fraud unless the fraud complained of is extrinsic and collateral to the proceeding, *and not intrinsic merely—that is, arising within the proceeding itself and concerning some matter necessarily under the consideration of the court upon the merits.*

*Id.* at 624, 3 S.E.2d at 2. (Citations omitted). (Emphasis added).

*Hewett v. Zegarzewski*, 90 N.C. App. 443, 446, 368 S.E.2d 877, 878 (1988) (emphasis added). Our Courts have continued to recite this general concept. *See First-Citizens Bank & Tr. Co. v. Four Oaks Bank & Tr. Co.*, 156 N.C. App. 378, 380, 576 S.E.2d 722, 724 (2003) (“However, to make a successful attack upon a foreign judgment on the basis of fraud, it is necessary that extrinsic fraud be alleged.” (citations and quotation marks omitted)). In *Florida National Bank v. Satterfield*, 90 N.C. App. 105, 107, 367 S.E.2d 358, 360 (1988), this Court observed that “[t]he Full Faith and Credit Clause of the United States Constitution requires North Carolina to enforce a judgment rendered in another state, if the judgment is valid under the laws of that state.” *Id.* We further stated in *Florida National Bank* that: “A foreign judgment may be collaterally attacked only on the grounds that it was obtained without jurisdiction; that fraud was involved in the judgment’s procurement; or that its enforcement would be against public policy.” *Id.* We also stated that “[a]lthough extrinsic fraud is a defense to an action to recover on a foreign judgment, intrinsic fraud is not.” *Id.*

However, our General Assembly enacted the Uniform Enforcement of Foreign Judgments Act (UEFJA) in 1989. *See* N.C. Gen. Stat. § 1C-1701 et seq. Under UEFJA, foreign judgment debtors

may file a motion for relief from, or notice of defense to, the foreign judgment on the grounds that the foreign

judgment has been appealed from, or enforcement has been stayed by, the court which rendered it, or on any other ground for which relief from a judgment of this State would be allowed.

N.C. Gen. Stat. § 1C-1705(a) (2011). Likewise, N.C. Gen. Stat. § 1C-1703(c) (2011) states that “[a] judgment so filed has the same effect and is subject to the same defenses as a judgment of this State and shall be enforced or satisfied in like manner[.]” Defendant contends this statute entitles a foreign judgment defendant to utilize any defense applicable to an in-state judgment. As discussed above, in the present case, the trial court agreed and it utilized Rule 60(b) to set aside the Alabama judgment; indeed, such an interpretation is warranted from the plain language of the statute. There remain, however, constitutional implications that must be determined.

As stated above, our Courts have not yet addressed the interplay between N.C.G.S. § 1C-1705, N.C.G.S. § 1A-1, Rule 60(b), and the United States Constitution. However, case law from other jurisdictions has addressed this issue involving similar statutes. For example, the appellate courts of Utah have concluded that “the remedies available under Rule 59 and 60 are limited by the Full Faith and Credit Clause of the United States Constitution when a foreign judgment is at issue.” *Bankler v. Bankler*, 963 P.2d 797, 799-800 (Utah App. 1998). In *Bankler*, the Utah Court of Appeals noted that:

“[n]either Rule 60(b) nor our Utah Foreign Judgment Act allows our Utah courts to reopen, reexamine, or alter a foreign judgment duly filed in this state, *absent a showing of fraud or the lack of jurisdiction or due process in the rendering state. Only these defenses may be raised to destroy the full faith and credit owed to the foreign judgment* sought to be enforced under the Foreign Judgments [sic] Act.”

*Id.* at 799 (citation omitted).

Likewise, the Supreme Court of Montana addressed this issue in *Carr v. Bett*, 970 P.2d 1017 (Mont. 1998), holding that: “We disagree with [the proposition that] . . . a foreign judgment duly filed in Montana can be subjected to the same defenses and proceedings for reopening or vacating as a domestic judgment, and remain consistent with full faith and credit.” *Id.* at 1024. The Montana court held that “the only defenses that may be raised to destroy the full faith and

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credit obligation owed to a final judgment are those defenses directed at the validity of the foreign judgment.” *Id.* Finally, the Montana court determined that:

certain defenses such as lack of personal or subject matter jurisdiction of the rendering court, fraud in the procurement of the judgment, lack of due process, satisfaction, or other grounds that make the judgment invalid or unenforceable may be raised by a party seeking to reopen or vacate a foreign judgment filed in Montana. These defenses have been recognized by other states that have held that the language similar to that found in § 25-9-503, MCA, does not allow the merits of a foreign judgment to be reopened or reexamined by the state where it is recorded.

*Id.* at 1024-25. The Colorado Court of Appeals has held similarly. *See Craven v. Southern Farm Bureau Cas. Ins.*, 117 P.3d 11, 14 (Colo.App. 2004) (“Postjudgment relief available from foreign judgments under C.R.C.P. 60(b) is limited to the following grounds: (1) the judgment is based upon extrinsic fraud; (2) the judgment is void; or (3) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application.”).

In opposition, Defendant cites two Third Circuit Court of Appeals cases in his discussion of Federal Rule of Civil Procedure 60(b), and argues that any distinction between intrinsic and extrinsic fraud is “meaningless.” In *Averbach v. Rival Mfg. Co.*, 809 F.2d 1016 (3rd Cir. 1987), the Third Circuit Court of Appeals discussed, but did not rule on, the “ ‘most unfortunate’ ” distinction between extrinsic and intrinsic fraud when considering relief from a judgment. Defendant also cites *Publicker v. Shallockross*, 106 F.2d 949 (3<sup>rd</sup> Cir. 1939), and argues that “the distinction between types of fraud under Rule 60(b) is chimerical and not easily ascertainable.” However, we first note that decisions of the Court of Appeals for the Third Circuit are not binding on our Court when interpreting the laws of our State. Further, the cases on which Defendant relies appear to criticize the distinction between intrinsic and extrinsic fraud in similar circumstances, but they do not abolish such distinction.

We find the reasoning of the Utah, Montana and Colorado appellate courts persuasive, and hold that in North Carolina, “the remedies

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available under Rule . . . 60 are limited by the Full Faith and Credit Clause of the United States Constitution when a foreign judgment is at issue.” *Bankler*, 963 P.2d at 799-800. We hold that postjudgment relief from foreign judgments under N.C.G.S. § 1A-1, Rule 60(b) is limited to the following grounds: “(1) the judgment is based upon extrinsic fraud; (2) the judgment is void; or (3) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application.” *Craven*, 117 P.3d at 14.

In the past, this Court has, without addressing this framework explicitly, held in accordance with these principles. In *Moss v. Improved B.P.O.E.*, 139 N.C. App. 172, 177, 532 S.E.2d 825, 829 (2000), this Court observed:

For a foreign judgment to be accorded full faith and credit in North Carolina, and thereby survive a Rule 60(b) motion, “the rendering court must . . . have respected the demands of due process. That is, the rendering court must . . . have afforded the parties adequate notice and opportunity to be heard before full faith and credit will be accorded the judgment. . . . [I]t follows that when a party against whom a default was entered subsequently challenges the validity of the original proceeding on grounds that he did not receive adequate notice, the reviewing court ordinarily must examine the underlying facts in the record to determine if they support the conclusion that the notice given of the original proceeding was adequate.”

*Id.* at 177, 532 S.E.2d at 829. Further, in *Walden v. Vaughn*, 157 N.C. App. 507, 579 S.E.2d 475 (2003), this Court ruled that:

The ‘Uniform Enforcement of Foreign Judgments Act’ (Act) provides that a judgment from another state, filed in accordance with the procedures set out in the Act, has the same effect and is subject to the same defenses as a judgment issued by a North Carolina court and shall be enforced or satisfied in a like manner.

*Id.* at 510, 579 S.E.2d at 477 (citation omitted). We then observed that “[i]n North Carolina, accord and satisfaction is a valid defense against a claim to enforce a judgment.” *Id.* Finally, we concluded that “the

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trial court did not err in considering defendants' defense of accord and satisfaction." *Id.*

For the foregoing reasons, we hold in the present case that, while the trial court's analysis is thorough and reasoned, the trial court did not have the benefit of the determination herein that the application of Rule 60(b) to a foreign judgment is limited by traditional interpretations of the Full Faith and Credit Clause. Plaintiff's motion to enforce the Alabama judgment should have been denied only if "(1) the judgment [was] based upon extrinsic fraud; (2) the judgment [was] void; or (3) the judgment [had] been satisfied, released, or discharged, or a prior judgment upon which it [was] based [had] been reversed or otherwise vacated, or it [was] no longer equitable that the judgment should have prospective application." *Craven*, 117 P.3d at 14. In the present case, the trial court denied Plaintiff's motion to enforce the Alabama judgment on the grounds of "intrinsic fraud, misrepresentation and misconduct." As we have held, these grounds are not sufficient under the Full Faith and Credit Clause to warrant the trial court's denial of Plaintiff's motion to enforce the Alabama judgment. We therefore vacate the trial court's order and remand for further proceedings.

Vacated and remanded.

Judges HUNTER, Robert C. and ELMORE concur.

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MARY H. FINNEY, PLAINTIFF

v.

RICHARD H. FINNEY, DEFENDANT

No. COA12-292

Filed 15 January 2013

**1. Divorce—equitable distribution—valuation—marital home**

The trial court did not err in an equitable distribution case by its valuation of the marital home. Defendant husband satisfied the requirement that he have both a knowledge of the property and some basis for his opinion, and therefore, his testimony provided competent evidence for the trial court's finding regarding the value of the marital home.

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**2. Divorce—equitable distribution—classification—bank accounts—separate property—misapplication of burden of proof**

The trial court erred in an equitable distribution case by its classification of the two pertinent bank accounts. Because the record contained conflicting evidence regarding the classification of the property as marital versus separate, it could not be concluded that the trial court's misapplication of the burdens of proof was harmless. The trial court must on remand determine, with appropriate findings of fact and conclusions of law, whether defendant husband met his burden of proving that the accounts constituted separate property.

**3. Divorce—equitable distribution—unequal—sufficiency of findings of fact**

The trial court erred in an equitable distribution case by making an unequal distribution of the marital estate. The trial court must make new findings of fact addressing the value of property owned separately by plaintiff wife and identify the statutory basis for its findings regarding defendant husband's use of separate property to buy or fund marital assets.

Appeal by plaintiff from judgment entered 15 July 2011 by Judge Monica H. Leslie in Haywood County District Court. Heard in the Court of Appeals 11 September 2012.

*Hylar & Lopez, P.A., by Stephen P. Agan and George B. Hylar, Jr., for plaintiff-appellant.*

*No brief filed on behalf of defendant-appellee.*

GEER, Judge.

Plaintiff Mary H. Finney appeals from an equitable distribution order making an unequal distribution of the marital estate. Because we have concluded that the trial court misallocated the burden of proof with respect to the classification of certain property and because certain of the findings of fact are not supported by the record, we must reverse and remand for further proceedings.

Facts

Robert and Mary Finney were married on 29 May 1993. The two separated on 4 January 2006. Ms. Finney filed a complaint seeking divorce from bed and board, post-separation support, a writ of pos-



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session on the marital home, equitable distribution, and attorneys' fees. Mr. Finney filed a verified answer on 15 February 2006.

The trial court entered an equitable distribution judgment on 15 July 2011. After making extensive findings regarding the identity, character, and value of the property at issue, the trial court determined the net value of the marital property for distribution to be \$247,138.23. The court concluded that an unequal distribution of the marital property in favor of Mr. Finney was equitable. The court then divided the property with 60% of the value of the marital property (\$148,283.00) awarded to Mr. Finney and 40% of the value of the marital property (\$98,855.23) awarded to Ms. Finney. The court then ordered Mr. Finney to make a distributive award to Ms. Finney in the amount of \$10,890.44. Ms. Finney timely appealed to this Court.

Discussion

“ ‘When the trial court sits without a jury, the standard of review on appeal is whether there was competent evidence to support the trial court's findings of fact and whether its conclusions of law were proper in light of such facts.’ ” *Williamson v. Williamson*, 217 N.C. App. 388, 390, 719 S.E.2d 625, 626 (2011) (quoting *Oakley v. Oakley*, 165 N.C. App. 859, 861, 599 S.E.2d 925, 927 (2004)). Those findings of fact not challenged on appeal are binding. *Peltzer v. Peltzer*, 222 N.C. App. 784, 787, 732 S.E.2d 357, 360, *disc. review denied*, 366 N.C. 417, 735 S.E.2d 186.

Equitable distribution is governed by N.C. Gen. Stat. § 50-20 (2011), which requires the trial court to conduct a three-step process: (1) classify property as being marital, divisible, or separate property; (2) calculate the net value of the marital and divisible property; and (3) distribute equitably the marital and divisible property. *Cunningham v. Cunningham*, 171 N.C. App. 550, 555, 615 S.E.2d 675, 680 (2005).

## I

**[1]** Ms. Finney first contends that the trial court's valuation of the marital home was not supported by competent evidence because that valuation was based upon Mr. Finney's opinion of the value of the residence. The trial court made the following finding of fact as to the value of the marital home:

85. That at the time of separation of the parties the home had a fair market value of \$249,000.00. The Defendant testified to his opinion of the FMV [fair

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market value] based upon an appraisal. The Plaintiff did not offer evidence of the FMV on the DOS [date of separation], and the Court finds Defendant's figure to be credible. The value of the home on the date of separation was \$233,473.44 (FMV-mortgage balance). Due to current market conditions in Haywood County, North Carolina, the home had a fair market value of \$189,000.00 at the time of trial, which was the amount the home was listed for with an experienced local real estate agent as of the date of hearing. The Defendant testified to this figure, and the Plaintiff did not offer evidence on this point, and the Court finds this figure to be credible. The depreciation in value was passive and not due to the fault or actions of either party. The total amount of depreciation is \$44,473.44.

Ms. Finney does not challenge the trial court's valuation of the marital home as of the date of separation. Nor does she dispute that Mr. Finney testified that the house, in his opinion, had a fair market value of \$189,000.00 at the time of trial. And, as the trial court noted, Ms. Finney did not herself submit any evidence of the value of the home.

It is well established that "[l]ay opinions as to the value of the property are admissible if the witness can show that he has knowledge of the property and some basis for his opinion." *Whitman v. Forbes*, 55 N.C. App. 706, 711, 286 S.E.2d 889, 892 (1982). Further, the owners of property have generally been held to have both a knowledge and basis for the testimony as to the value of their property. *See Goodson v. Goodson*, 145 N.C. App. 356, 361, 551 S.E.2d 200, 204-05 (2001) (holding co-owner of property competent to testify as to value even though she did not know value of surrounding property). *See also N.C. State Highway Comm'n v. Helderman*, 285 N.C. 645, 652, 207 S.E.2d 720, 725 (1974) ("Unless it affirmatively appears that the owner does not know the market value of his property, it is generally held that he is competent to testify as to its value . . .").

At trial Mr. Finney testified that since the date of separation, his efforts to sell the marital home had not been successful, and he had come to understand, in consultation with the listing agent, that the value of the home as of the date of the trial was \$189,000.00:

Q. Okay. And have there been efforts since August 2008 to sell this home?

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A. Yes, several.

Q. Okay. And do you have an opinion as to the fair market value of this home, at this time?

A. Yes, I do have an opinion.

Q. What is your opinion?

A. I've talked that over with the realtor, and 189,000.

Q. 189-?

Mr. Finney was a co-owner of the property and, therefore, was competent to testify as to its market value in the absence of evidence that he had no knowledge of the value of the property. Mr. Finney's testimony showed that he did have a basis for his valuation in that he had been engaged in a good faith effort to sell the home and his valuation was based on conversations with his real estate agent about the proper price for the house given market conditions. Mr. Finney satisfied the requirement that he have both a "knowledge of the property and some basis for his opinion" and, therefore, his testimony provided competent evidence for the trial court's finding regarding the value of the marital home. *Whitman*, 55 N.C. App. at 711, 286 S.E.2d at 892.

## II

[2] Ms. Finney next contends that the trial court erred in determining that accounts at the North Carolina State Employees' Credit Union ("SECU")—(1) account # 7611644 and (2) account # 7414053—were separate property even though acquired during the marriage. Under N.C. Gen. Stat. § 50-20(b)(1), marital property includes "all real and personal property acquired by either spouse or both spouses during the course of the marriage and before the date of the separation of the parties, and presently owned, except property determined to be separate property or divisible property in accordance with subdivision (2) or (4) of this subsection." N.C. Gen. Stat. § 50-20(b)(1) continues: "It is presumed that all property acquired after the date of marriage and before the date of separation is marital property except property which is separate property under subdivision (2) of this subsection."

In applying this statute, this Court has explained that "[a] party claiming that property is marital has the burden of proving beyond a preponderance of the evidence that the property was acquired: by

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either or both spouses; during the marriage; before the date of separation; and is presently owned.” *Fountain v. Fountain*, 148 N.C. App. 329, 332, 559 S.E.2d 25, 29 (2002) (internal quotation marks omitted). “ ‘If the party meets this burden, then the burden shifts to the party claiming the property to be separate to show by a preponderance of the evidence that the property meets the definition of separate property.’ ” *Id.* at 332-33, 559 S.E.2d at 29 (quoting *Lilly v. Lilly*, 107 N.C. App. 484, 486, 420 S.E.2d 492, 493 (1992)). If both parties meet their burdens, the property is considered separate property. *Id.* at 333, 559 S.E.2d at 29.

The trial court made the following findings of fact and conclusions of law as to account # 7611644:

32. That on July 18, 2000, the Plaintiff and Defendant opened a joint money market account #7611644 as reflected in Plaintiff Exhibit 107a, with a deposit of \$4,000.00. The \$4,000.00 was an inheritance disbursement to Defendant. Defendant testified that he opened the #7611644 account to maintain funds inherited by him from family as he intended to maintain this account with inherited funds he intended to be disbursed to his children at a later time. Statements for this account came to Defendant, and he solely maintained this account and deposited only separate funds into it. Plaintiff never made deposits to this account during the course of the marriage.
33. The Court finds that Plaintiff has not met her burden that SECU account #7611644 is marital, by the preponderance of the evidence. North Carolina appellate courts have repeatedly held that “the deposit of [separate] funds into a joint account, standing alone, is not sufficient evidence to show a gift or an intent to convert the funds from separate property to marital property.” *Manes v. Harrison-Manes*, 79 N.C. App. 170, 172, 338 S.E.2d 815, 817 (1986). The Plaintiff has not met her burden of proving that the Defendant intended that the account be marital property, nor that any such intention was expressed in the conveyance. *Friend-Novorska v. Novorska*, 131 N.C. App. 508, 507 S.E.2d 900 (1998). This account is therefore Defendant’s separate

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property. As of the DOS, the value of this account was \$0.00, because the Plaintiff withdrew \$7,000.00, and the Defendant withdrew the remainder (approximately \$8,000.00), from the account on January 3, 2006, the day prior to the separation. The separate funds withdrawn by Plaintiff are addressed below.

(Emphasis added.)

With respect to account # 7414053, the trial court found that the account was established on 7 December 1995, during the marriage; the account was opened as a joint account; and various assets were received into the account during the marriage. The trial court then made the following conclusion of law:

57. *That the Court finds that Plaintiff has not carried her burden in establishing that SECU account #7414053 is marital property*, in that she has not established by the preponderance of the evidence that there was an intention that the account be marital property, nor that that intention was expressed in the conveyance. The Court therefore classifies this account as Defendant's separate property. The amount in the account on the DOS was \$3280.50.

(Emphasis added.)

The court's conclusions of law that Ms. Finney did not meet her burden of showing that the SECU accounts # 7611644 and # 7414053 were marital property misapply the law. The trial court's own findings establish that the property was acquired by one of the spouses, during the marriage and before the date of separation, and that the property was presently owned. Under *Fountain*, Ms. Finney had, therefore, satisfied her burden of proof on the issue whether the property was marital. *Id.* at 332, 559 S.E.2d at 29. The burden then shifted to Mr. Finney to prove by a preponderance of the evidence that the accounts were separate property. *Id.* at 332-33, 559 S.E.2d at 29.

At trial, although Mr. Finney asserted he had allowed Ms. Finney access to both of these accounts in 2002 only because of his diagnosis of cancer, evidence was also presented that both accounts were set up as joint accounts in 1995, one of Mr. Finney's paychecks was deposited into account # 7414053, and the parties' joint tax refund check was deposited into account # 7611644 in March 2000. Because

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the record contains conflicting evidence regarding the classification of the property as marital versus separate, we cannot conclude that the trial court's misapplication of the burdens of proof was harmless. We must, therefore, reverse and remand with respect to the classification of the two SECU accounts.

## III

[3] Ms. Finney next contends that the trial court erred in determining that there should be an unequal distribution of marital property in favor of Mr. Finney. The trial court's equitable distribution award is reviewed for an abuse of discretion and will be reversed "only upon a showing that it [is] so arbitrary that it could not have been the result of a reasoned decision." *White v. White*, 312 N.C. 770, 777, 324 S.E.2d 829, 833 (1985).

If the trial court decides that an equal division of the property is not equitable, then the court must make findings of fact as to each of the factors set out in N.C. Gen. Stat. § 50-20(c) for which evidence was presented. *Plummer v. Plummer*, 198 N.C. App. 538, 543, 680 S.E.2d 746, 750 (2009). Ms. Finney contends that certain of the trial court's findings on those factors are not supported by competent evidence.

First, Ms. Finney points to the court's finding that "Plaintiff owned the [sic] 14 acres of separate real property which she believed to be valued at \$123,000.00[.]" We agree with Ms. Finney that the record contains no testimony that she believed the 14 acres were valued at \$123,000.00. It appears that the trial court confused this acreage with Ms. Finney's condominium—an entirely different asset—which she indeed purchased for \$123,000.00.

Ms. Finney also challenges the trial court's finding of fact that Ms. Finney "paid \$20,000 as a down payment" on the condominium. Ms. Finney gave the following testimony relevant to this finding of fact:

Q. Okay. Did you make a down payment?

A. I did.

Q. How much?

A. 13- or 14,000.

Q. What was the source of those funds?

A. They were from my mother's home. She had passed away in December, before I bought my house,

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and we—my brother's family sold them the house and we each got one-fifth share, and that was my check.

Q. Okay. You got half of 13,000?

A. No, I got a little bit less than 20,000.

Q. So a little under 20-. Okay. And then did you pay a mortgage for the balance of the price?

A. Did I what?

Q. Take out a mortgage for the balance?

A. Yes.

The testimony is not sufficient to support the trial court's finding that a \$20,000.00 down payment was made on the condominium. Although counsel's questions are a bit confusing, Ms. Finney's testimony indicates that she received a little less than \$20,000.00 from the sale of her mother's home and paid \$13,000.00 or \$14,000.00 as a down payment on her condominium. There is no testimony to support the finding that Ms. Finney paid \$20,000.00 as a down payment on her condominium.

Ms. Finney also challenges the trial court's finding that the condominium had a fair market value of \$110,000.00 at the time of the trial. At two points in her testimony, Ms. Finney addressed the value of her condominium. Counsel for Mr. Finney asked Ms. Finney for her opinion of the fair market value of the condominium, and she replied: "Well, in light of (inaudible), I think probably no more than 102-."

Later, when questioned by her own attorney, Ms. Finney testified as follows:

Q. All right. Now, the condo that you said has a fair market value of no more than \$110,000 to [Mr. Finney's attorney's] question. What do you owe on it, as of today?

A. I'm sorry?

Q. [Mr. Finney's attorney] asked you about the fair market value of your condo, and you said no more than \$110,000. How much do you owe on that condo, as of today?

A. I think it's about 108,000.

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Q. And have condos in that condo unit sold recently?

A. Yes, they have. There were 13 for sale. The one next to me sold for 105,000.

Q. Is it comparable to yours?

A. Yes, its identical.

Thus, at one point, the transcript indicates that Ms. Finney testified that the value of her condominium was \$102,000.00, but her attorney's questions later seemed to indicate that Ms. Finney had testified that the condominium was worth \$110,000.00. While Ms. Finney did not specifically adopt her attorney's figure, she also did not correct her attorney, and the sales price of an identical condominium exceeded the \$102,000.00 figure.

Ms. Finney claims that the confusion in testimony was the result of a transcriptionist's error. We cannot resolve that question on appeal, but, based on the transcript, we cannot say that the trial court's finding of fact lacked support in the record. Nonetheless, because we must remand due to other errors, if the transcript mistakenly recorded either the testimony or the questions, that mistake can be corrected on remand.

Finally, Ms. Finney contends that the trial court erred in considering whether there was "[a]ny direct contribution to an increase in value of separate property which occurs during the course of the marriage" in distributing the marital property in this case pursuant to N.C. Gen. Stat. § 50-20(c)(8). The trial court made the following findings potentially relevant to that statutory factor:

159. That Defendant purchased a vehicle for the parties use during the marriage out of his separate funds.
160. That Defendant made a substantial down payment on the marital home out of his separate funds.
161. That Defendant established an IRA account for Plaintiff funded with his separate funds to supplement her retirement income.
162. That Plaintiff offered to put some of the money she made selling her separate real property towards the mortgage on the marital home, but Defendant declined the offer.



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Although Ms. Finney asserts that these findings necessarily relate to the N.C. Gen. Stat. § 50-20(c)(8) factor, our courts have considered one spouse's contribution of separate property to acquire marital property under N.C. Gen. Stat. § 50-20(c)(12) (allowing the court to consider “[a]ny other factor which the court finds to be just and proper”). *See, e.g., Collins v. Collins*, 125 N.C. App. 113, 116, 479 S.E.2d 240, 242 (1997) (“[T]his Court has previously held that a spouse's contribution of his separate property to the marital estate is a distributional factor under N.C. Gen. Stat. § 50-20(c)(12).”). *See also* Suzanne Reynolds, 3 *Lee's North Carolina Family Law* § 12.95(c)(iii), at 285-87 (5th ed. 2002). On remand, the trial court should clarify to which statutory factor its findings apply.

Ms. Finney's other arguments address the weight that the trial court should have given each factor. Because we remand the case for further findings of fact regarding the evidence relating to those factors, we need not address whether the trial court abused its discretion in weighing those factors.

**Conclusion**

Because the trial court misapplied the burdens of proof with respect to the classification of the SECU accounts, the court must on remand determine, with appropriate findings of fact and conclusions of law, whether Mr. Finney met his burden of proving that the accounts constituted separate property. Further, the trial court must make new findings of fact addressing the value of property owned separately by Ms. Finney and identify the statutory basis for its findings regarding Mr. Finney's use of separate property to buy or fund marital assets. Once the court makes those findings, it must then decide again on an equitable distribution of the property.

Reversed and remanded.

Chief Judge MARTIN and Judge STROUD concur.

## IN THE COURT OF APPEALS

**GREENE v. CITY OF GREENVILLE**

[225 N.C. App. 24 (2013)]

PATTY C. GREENE, ADMINISTRATRIX OF THE ESTATE OF  
BILLY RAY GREENE, PLAINTIFF

v.

THE CITY OF GREENVILLE, NORTH CAROLINA,  
A MUNICIPAL CORPORATION, DEFENDANT

No. COA12-908

Filed 15 January 2013

**1. Appeal and Error—interlocutory orders—governmental immunity**

Defendant city's interlocutory appeal from the trial court's interlocutory order denying its motion to dismiss was heard by the Court of Appeals because the order implicated a local government body's governmental immunity.

**2. Wrongful Death—police officer conduct—gross negligence**

The trial court erred in a wrongful death action by denying defendant city's motion for summary judgment. The police officer's conduct did not rise to the level of gross negligence per N.C.G.S. § 20-145.

Appeal by defendants from order entered 11 April 2012 by Judge J. Carlton Cole in Pitt County Superior Court. Heard in the Court of Appeals 27 November 2012.

*EDWARDS & EDWARDS, L.L.P., by Joseph T. Edwards and Sharron R. Edwards, for plaintiff.*

*TROUTMAN SANDERS, LLP, by Gary S. Parsons, Gavin B. Parsons, and D. Kyle Deak, and the City of Greenville, by Assistant City Attorney, William J. Little, III, for defendants.*

ELMORE, Judge.

On 9 April 2009, Patty C. Greene (plaintiff), executrix of the estate of Billy Rae Greene (the decedent), initiated this wrongful death action against the City of Greenville and the estate of Officer Campbell (defendants). On 21 September 2009, the trial court granted the Campbell Estate's motion to dismiss all claims against it in its individual capacity. Thereafter, defendants motioned for summary judgment, asserting that Officer Campbell's conduct did not rise to the level of gross negligence per N.C. Gen. Stat. § 20-145. On 11 April 2012, the trial court denied defendants' motion. They now appeal. After careful consideration, we reverse the trial court's decision.

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**I. Background**

On 14 April 2007, Officer Jason Campbell (Officer Campbell) and Officer Nathan LeCompte (Officer LeCompte) of the Greenville Police Department were assigned to bike patrol at the “Pirate Fest,” a weekend festival attended by many East Carolina University students. The area was congested with vehicular and foot traffic. At approximately 1:00 p.m., Officer Campbell smelled a strong odor of marijuana being emitted from a passing Cadillac. The acting post supervisor, Sergeant Chris Ivey (Sergeant Ivey), also noted the odor and subsequently authorized Officers Campbell and LeCompte to take a police cruiser and pursue the vehicle.

Officer Campbell began the pursuit on First Street and then continued onto Green Street. As he followed the Cadillac, his right hand remained near the switches used to activate the cruiser’s lights and siren; however, he did not activate either. Officer LeCompte testified that it is common for an officer to refrain from activating the lights and/or sirens during a police pursuit. This is done to help prevent suspects from discarding contraband or readying a weapon before an officer is prepared to make a stop.

Within a minute of the pursuit, Officer Campbell encountered a vehicle making an un-signaled right turn. To avoid a collision, he braked and steered to the left, ultimately losing control of the vehicle. The cruiser rotated clockwise and skidded across the centerline, colliding with the decedent’s vehicle. Officer Campbell died in the accident. The posted speed limit on Green Street was 45 m.p.h. The State Highway Patrol Collision Reconstruction Unit concluded that the cruiser likely reached a maximum speed of 75 m.p.h. but was traveling at approximately 50 m.p.h. on impact. It is estimated that the decedent was traveling at approximately 40 m.p.h. on impact.

**II. Analysis****A. Interlocutory Appeal**

[1] Defendants acknowledge that this appeal is interlocutory. However, defendants assert that the order denying their motion for summary judgment affected a substantial right and is immediately appealable because it implicated a local government body’s governmental immunity.

We have held that “immediate appeal of interlocutory orders and judgments is . . . available from an interlocutory order or judgment which affects a substantial right.” *Sharpe v. Worland*, 351 N.C. 159, 161-62, 522 S.E.2d 577, 579 (1999) (quotation marks omitted). More-

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over, we have previously held that a substantial right exists in a local government's assertion of sovereign immunity. *See, e.g., Hedrick v. Rains*, 121 N.C. App. 466, 468, 466 S.E.2d 281, 283 ("orders denying dispositive motions grounded on the defense of governmental immunity are immediately reviewable as affecting a substantial right"), *aff'd per curiam*, 344 N.C. 729, 477 S.E.2d 171 (1996). As such, this appeal is properly before us for review.

**B. Motion for Summary Judgment**

[2] Defendants argue that the trial court erred in denying their motion for summary judgment because Officer Campbell's conduct did not constitute gross negligence under N.C. Gen. Stat. § 20-145. We agree.

"Our standard of review of an appeal from summary judgment is *de novo*; such judgment is appropriate only when the record shows that 'there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law.'" *In re Will of Jones*, 362 N.C. 569, 573, 669 S.E.2d 572, 576 (2008) (quoting *Forbis v. Neal*, 361 N.C. 519, 524, 649 S.E.2d 382, 385 (2007)). "[A]ll inferences of fact . . . must be drawn against the movant and in favor of the party opposing the motion." *Caldwell v. Deese*, 288 N.C. 375, 378, 218 S.E.2d 379, 381 (1975). Our Supreme Court has "emphasized that summary judgment is a drastic measure, and it should be used with caution." *Williams v. Carolina Power & Light Co.*, 296 N.C. 400, 402, 250 S.E.2d 255, 257 (1979). "[I]ssues of negligence are generally not appropriately decided by way of summary judgment, [unless] there are no genuine issues of material fact, and an essential element of a negligence claim cannot be established[.]" *Norris v. Zambito*, 135 N.C. App. 288, 293, 520 S.E.2d 113, 116 (1999).

N.C. Gen. Stat. § 20-145 exempts police officers from speed laws when pursuing a law violator. However, the exemption "does not apply to protect the officer from the consequence of a reckless disregard of the safety of others." *Norris v. Zambito*, 135 N.C. App. 288, 293, 520 S.E.2d 113, 117 (1999). Our Supreme Court has held that "an officer's liability in a civil action for injuries resulting from the officer's vehicular pursuit of a law violator is to be determined pursuant to a gross negligence standard of care." *Id.* Grossly negligent behavior is defined as "wanton conduct done with conscious or reckless disregard for the rights and safety of others." *Id.* at 294, 520 S.E.2d at 117 (citations and quotations omitted). Whether an officer's behavior during pursuit amounted to gross negligence is an issue of law to be determined from the evidence. *Id.* at 293, 520 S.E.2d at 117.

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“North Carolina’s standard of gross negligence, with regard to police pursuits, is very high and rarely met.” *Eckard v. Smith*, 166 N.C. App. 312, 323, 603 S.E.2d 134, 142 (2004). In fact, “we can find no case where this Court or our Supreme Court has found that gross negligence existed.” *Villepigue v. City of Danville*, 190 N.C. App. 359, 366, 661 S.E.2d 12, 16 (2008), *disc. review denied*, 362 N.C. 688, 671 S.E.2d 532 (2009).

When determining whether an officer’s actions constitute gross negligence, we consider: (1) the reason for the pursuit, (2) the probability of injury to the public due to the officer’s decision to begin and maintain pursuit, and (3) the officer’s conduct during the pursuit. *See Norris*, 135 N.C. App. at 294–95, 520 S.E.2d at 117.

Relevant considerations under the first prong include whether the officer “was attempting to apprehend someone suspected of violating the law” and whether the suspect could be apprehended by means other than high speed chase. *Id.* at 294, 520 S.E.2d at 117. Here, Officer Campbell smelled marijuana being emitted from a passing vehicle, suggesting a violation of drug laws. Thus, Officer Campbell’s reason for engaging in the pursuit was valid and lawful.

When assessing prong two, we look to the (1) time and location of the pursuit, (2) the population of the area, (3) the terrain for the chase, (4) traffic conditions, (5) the speed limit, (6) weather conditions, and (7) the length and duration of the pursuit. *See Id.* at 294-95, 520 S.E.2d at 117.

In *Lunsford v. Renn*, this Court declined to find gross negligence when an officer activated his lights and pursued a vehicle on a Saturday afternoon through heavier than normal traffic on a hilly road past “a residential neighborhood, a business, a church, and a shopping mall.” 207 N.C. App. 298, 301, 700 S.E.2d 94, 95-96 (2010). In the case *sub judice*, the pursuit took place on a Saturday afternoon in an area congested with heavier than normal foot traffic. However, Officer LeCompte testified that no vehicle traffic impeded their pursuit and that no pedestrians crossed their path of travel. Moreover, there was no indication of unusually dangerous terrain, the cruiser managed to slow to approximately five m.p.h. over the speed limit immediately preceding the impact, and the pursuit ended within a minute. Therefore, we conclude that these facts are insufficient to establish gross negligence under prong two.

Under the third prong we look to Officer Campbell’s conduct during the pursuit. Relevant factors include (1) whether an officer made

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use of the lights or siren, (2) whether the pursuit resulted in a collision, (3) whether an officer maintained control of the cruiser, (4) whether an officer followed department policies for pursuits, and (5) the speed of the pursuit. *Norris*, 135 N.C. App. at 295, 520 S.E.2d at 117.

In *Young v. Woodall*, our Supreme Court concluded that the officer's decision not to activate the lights or siren, to enter an intersection while a caution light was flashing, and to exceed the speed limit while in pursuit of a vehicle at approximately 2:00 a.m. were "acts of discretion" which were potentially negligent but did not rise to the level of gross negligence. 343 N.C. 459, 463, 471 S.E.2d 357, 360 (1996).

Here, Officer Campbell followed common procedure and exercised his discretion by waiting to activate the siren and lights. *See Id.* Moreover, there is no evidence that Officer Campbell lost control prior to his attempt to avoid a crash with the vehicle making an unsignaled turn. Although he violated policy by failing to notify the police communications center of the pursuit, this failure does not constitute gross negligence. *See e.g. Id.* (violating a policy requiring that the blue light and siren be activated when a patrol car exceeds the speed limit does not establish gross negligence). Finally, we recognize that Officer Campbell reached a maximum speed of approximately 30 m.p.h. over the speed limit. However, exceeding the speed limit is also insufficient to establish gross negligence. *See Parish v. Hill*, 350 N.C. 231, 245, 513 S.E.2d 547, 555 (1999). We conclude that these circumstances do not demonstrate the degree of reckless indifference toward the safety of others required to establish gross negligence. Accordingly, in light of controlling precedent and the discretion afforded officers in pursuit of law violators, we hold that the trial court erred in denying defendants' motion for summary judgment.

**III. Conclusion**

In sum, the evidence presented in the case *sub judice* does not create a genuine issue of material fact as to whether Officer Campbell's conduct rose to the level of gross negligence per N.C. Gen. Stat. § 20-145. Therefore, the trial court erred in denying defendants' motion for summary judgment. After careful consideration, we reverse the lower court's decision and remand for entry of summary judgment in favor of defendants.

Reversed.

Judges McGEE, and HUNTER, Robert C. concur.

## IN RE A.Y.

[225 N.C. App. 29 (2013)]

IN THE MATTER OF A.Y.

No. COA12-80

Filed 15 January 2013

**1. Constitutional Law—right to counsel—waiver—appointment of guardian ad litem in assistive capacity**

The trial court did not err in a child neglect case by allowing respondent mother to waive counsel and proceed pro se even though respondent contended the appointment of a guardian ad litem (GAL) precluded respondent from waiving counsel on her own behalf. Because the GAL was acting only in an assistive capacity, respondent had the ability to waive counsel, so long as that waiver was knowing and voluntary.

**2. Child Abuse, Dependency, and Neglect—cessation of reunification efforts—sufficiency of findings of fact**

The trial court did not err in a child neglect case by ceasing reunification efforts and granting guardianship of a minor child to her grandparents even though respondent mother contended there were insufficient findings of fact to support the decision. Given the trial court's binding findings of fact and the supported portion of finding of fact eight, it could not be concluded that the unsupported portions of finding of fact eight were material to the trial court's decision to cease reunification efforts.

**3. Child Abuse, Dependency, and Neglect—waiver of future review hearings—reversed**

The Court of Appeals reversed the portion of the trial court's order waiving future review hearings in a child neglect case and remanded for the trial court to reconsider whether future review hearings are needed and to make appropriate findings of fact to support its decision.

Appeal by respondent from order entered 13 October 2011 by Judge Melinda H. Crouch in New Hanover County District Court. Heard in the Court of Appeals 24 July 2012.

*Gail E. Carelli for petitioner-appellee.*

*Appellate Defender Staples Hughes, by Assistant Appellate Defender J. Lee Gilliam, for respondent-appellant.*

## IN RE A.Y.

[225 N.C. App. 29 (2013)]

*N.C. Administrative Office of the Courts, by Appellate Counsel Pamela Newell, for guardian ad litem.*

GEER, Judge.

Respondent mother appeals from the trial court's order ceasing reunification efforts and granting guardianship of the minor child A.Y. ("Ava")<sup>1</sup> to the child's paternal grandparents. Respondent mother primarily argues that the trial court erred in allowing her to proceed pro se. She contends that because the court had appointed respondent mother a guardian ad litem ("GAL"), only the GAL, acting in a substitutive capacity, could waive counsel. Under this Court's recent decision on remand from the Supreme Court in *In re P.D.R., L.S.R., J.K.R.*, 224 N.C. App. 460, 737 S.E.2d 152 (2012), we hold that even though the trial court did not specify whether the GAL was to serve in a substitutive or assistive capacity, a review of the record indicates that the GAL was intended to be assistive only. We hold that the trial court conducted a sufficient inquiry to determine that her waiver was proper.

We affirm the trial court's order to the extent it ceased reunification efforts and granted guardianship of Ava to her grandparents. We reverse and remand, however, with respect to the order's waiver of further review hearings.

### Facts

The New Hanover County Department of Social Services ("DSS") first became involved with respondent mother in January 2010 due to a 911 domestic violence call. Between January 2010 and May 2010, there were at least four 911 calls because of domestic violence. On 3 May 2010, an incident of domestic violence led to respondent mothers obtaining a Domestic Violence Protective Order against respondent father.

On 7 May 2010, DSS filed a juvenile petition alleging that then five-year-old Ava was a neglected juvenile due to her parents' failure to provide proper care and supervision and their exposing Ava to a risk of physical and emotional injury. DSS gained non-secure custody and placed Ava with her paternal grandparents on 12 May 2010.

The trial court appointed counsel for respondent mother on 19 May 2010 and appointed a GAL for respondent mother pursuant to

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1. The pseudonym "Ava" is used throughout this opinion to protect the minor's privacy and for ease of reading.



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N.C. Gen. Stat. § 7B-620(c) on 25 June 2010. During the adjudication hearing on 14 July 2010, respondent mother's court-appointed attorney sought to withdraw, and respondent mother requested to proceed pro se. Respondent mother's GAL agreed with the attorney's request to withdraw given a personality conflict between respondent mother and the attorney. However, both DSS and respondent mother's GAL objected to respondent mother's request to proceed pro se on the grounds that it would not be in respondent mother's best interest. The trial court denied the request, appointed a substitute attorney, and ordered respondent mother to undergo a psychological evaluation.

Respondent mother underwent the psychological evaluation on 4 August 2010. That evaluation indicated that respondent mother had "average to high average" intelligence and "scored very high on a measure of common sense, moral reasoning, and judgment." According to the psychologist, these findings "raise[d] the question of the need for a Guardian Ad Litem" because such "scores suggest that she has the cognitive abilities to understand situations and their consequences[.]" The evaluation also concluded that respondent mother was "somewhat dysfunctional and has made, and continues to make, poor decisions"; continues to use marijuana without any plans to quit; and although she "recogniz[es] how problematic [respondent father] is as a parent and his bad influence on her, she nevertheless continues to interact with him even after obtaining a restraining order." The psychologist concluded that "her poor decision making is not due to cognitive limitations, but rather it is due to characterological (personality) features."

By order entered 29 September 2010, the trial court adjudicated Ava neglected based on a stipulation of the parties. The dispositional hearing was held 25 October 2010, at which time respondent father was again residing with respondent mother. The court found that returning custody to either parent was premature due to allegations of neglect, substance abuse, and domestic violence. The court ordered, among other things, for respondent mother to "complete Empowerment Groups" and that the Domestic Violence Protective Order be dismissed so that the parents could undergo couples counseling.

At a permanency planning review hearing held on 10 March 2011, the trial court ordered DSS to continue reunification efforts and for each parent to continue therapy and parenting education classes. Respondent parents began couples counseling in May 2011, but during the second session two weeks later, respondent parents had a verbal

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altercation that became so aggressive that the therapist considered calling 911.

On 2 June 2011, respondent mother's second attorney filed a motion to withdraw. On the same day, respondent mother signed a waiver of the right to assistance of counsel. At the start of the permanency planning review hearing on 8 August 2011, the trial court, after reviewing this Court's decision in *In re P.D.R., L.S.R., J.K.R.*, 212 N.C. App. 326, 713 S.E.2d 60 (2011), *rev'd and remanded*, 365 N.C. 533, 723 S.E.2d 335 (2012), questioned respondent mother and her GAL regarding respondent mother's decision to waive counsel and represent herself:

THE COURT: Okay. [Respondent mother], you understand that this matter is on for a review hearing in the juvenile case that was filed alleging that your daughter was neglected? Do you understand that?

[RESPONDENT MOTHER]: [*No audible response*].

THE COURT: And you'll need to answer out loud because because we record these proceedings.

[RESPONDENT MOTHER]: Yes.

THE COURT: Okay. And do you understand that you have a right to represent yourself in this matter?

[RESPONDENT MOTHER]: Yes.

THE COURT: And that if you cannot afford an attorney, one can be appointed to represent you?

[RESPONDENT MOTHER]: Yes.

THE COURT: And that previously you had Beth Bryant [*phonetic*] represent you and had represented you as provisional counsel all the way through to the last court appearance that you had. Is that correct?

[RESPONDENT MOTHER]: Yes.

THE COURT: And you had requested to represent yourself at the last court appearance. Is that correct?

[RESPONDENT MOTHER]: Yes.

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THE COURT: And do you understand that, representing yourself, you have to understand the process, and the procedural aspects of the case, not just the factual aspects of the case?

[RESPONDENT MOTHER]: Yes.

THE COURT: And at some point early in this process, the Department of Social Services had requested and the Court had appointed a Guardian Ad Litem for you?

[RESPONDENT MOTHER]: Yes.

THE COURT: Which indicates to me that, in order to protect the record, that it was probably an error on my part to have allowed [Respondent Mother] to discharge Ms. Bryant based upon my re-reading of PDR because I needed not only to inquire as to whether or not her waiver of counsel was knowing and voluntary but also whether she had the competence to represent herself in this matter, but [sic] only to show whether she was competent to waive counsel but also that she was competent to represent herself in this matter. And I don't think that the inquiry in the record went far enough, and given the fact that she was appointed a Guardian ad Litem would certainly create an issue with regards to her ability to make those decisions.

[RESPONDENT MOTHER]: If I could just say something?

THE COURT: Yes, ma'am.

[RESPONDENT MOTHER]: It's been too long already, and I don't think that I would trust my lawyer at this point. *[Inaudible]*. I've already had two. I spent all night staying up *[Inaudible]* getting ready for this day, and I want—I mean each time that we move it around I'm missing my daughter more and more. So I really don't want—I really want to go forward.

THE COURT: Well, [respondent mother], what I'm trying to do is to protect your legal rights, legal rights as to the access to your daughter, and regardless of whether or not you spent all night staying up preparing, the question is whether you're actually competent to do so.

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**[Pause.]**

[RESPONDENT MOTHER]: I understand the procedure of it. I understand the case, and from my perspective, it doesn't look like they have too much on me [*Inaudible*]. I don't think anybody could do it better because they don't know what's going on like I do.

THE COURT: And have you had an opportunity to confer with your Guardian ad Litem?

[RESPONDENT MOTHER]: [*Inaudible*]. We didn't really get to talk very much. We spoke about it. We spoke about it before.

**[Pause.]**

THE COURT: Ms. Michael [respondent mother's GAL], do you have concerns as to [respondent mother]'s competence to represent herself?

MS. MICHAEL: As far as capacity, Your Honor, she's her own person. She does not have a Guardian other than the Guardian that the State's assigned her. So the Guardian d [sic] Litem throughout the case—she's a very intelligent young woman, very driven young woman.

I have told her multiple times I do not believe it is in her best interest to proceed without counsel as this involves her Constitutional rights as a parent and the future of her child and how much involvement she will have in her child's life. So I have advised her, as her Guardian ad Litem, not to proceed without counsel. I think that she understands the ramifications of today. She, albeit, is not an attorney or licensed, but she is very adamant about representing herself pro se and continuing with the matter.

I don't think that she's mentally handicapped from representing herself. I think, from a capacity standpoint, as far as—as far as an IQ score or determination, more mentally handicapped as far as her psychological evaluation or any mental limitation. I think she's needed assistance throughout

## IN RE A.Y.

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the process because of her [*Inaudible*] and communication trouble that she's had with various players in the case, and that's been my role, has been my posture.

THE COURT: Yeah, but communication with you—inform the Court what you mean by that.

MS. MICHAEL: I think that [respondent mother] can be confused as far as common sense versus the law. I think that, when she is told or heard something, she can react quicker than she should as far as her actions or words.

[RESPONDENT MOTHER]: I would like to show that I am just emotional in this situation, but they take a defensive or not, you know, wanting to cooperate. They don't take into account that they just said, "We're never going to send your daughter home," or, "I'll take your daughter away from you." Like, I just—there are certain things that, in my opinion, [*Inaudible*] that are just—you know, you don't say to another person. I mean that being said.

THE COURT: Well, [respondent mother], do you—

[Pause.]

THE COURT: Does the emotional nature of this proceeding impair your ability to act rationally?

[RESPONDENT MOTHER]: I've taken two—

THE COURT: Well, you need to answer my question first, rather than explain.

[RESPONDENT MOTHER]: Can you say it one more time?

THE COURT: Do you believe that the emotional nature of this proceeding may impair your ability to act rationally?

[RESPONDENT MOTHER]: Absolutely, Your Honor. This is very, very important to me.

THE COURT: Can you tell me a little bit about your education background?

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[RESPONDENT MOTHER]: Right now, I am going to [Inaudible] one year just have a basic Associate Degree, criminal justice major. I just signed up for paralegal classes. This is what I want to do. After this experience, I want to be a lawyer that helps people in my situation. So I would—this is very important to me, and I want to, you know, [Inaudible]. I have taken psychology, sociology, English.

[Pause.]

[RESPONDENT MOTHER]: [Inaudible].

[Pause.]

MS. MICHAEL: Just to respond—continue to respond to Your Honor's questions of the Guardian for [respondent mother], [Inaudible] found that she bears cognitive abilities in the average to high average range, and her IQ is above almost 80 percent of the population. Moreover, her cognitive abilities are relatively stable across [Inaudible], and she even shows a particular propensity for common sense and judgement. [Inaudible] cause of her difficulties appear to be more personality. That's more of what I've been doing in helping to assist.

[RESPONDENT MOTHER]: Also, that's personal opinion [Inaudible].

THE COURT: Anything further from you, [respondent mother]?

[RESPONDENT MOTHER]: I would just like to at least try, and I can show you. I have questions that are important, parts that I've realized [Inaudible] from the beginning, and my lawyer wouldn't speak up and say anything. That's all I have.

THE COURT: Thank you. Anything from you, Ms. Carelli or Mr. Highsmith?

MS. CARELLI: No.

[Pause.]

THE COURT: Okay. I'm going to allow you to proceed.

[RESPONDENT MOTHER]: Thank you.

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[225 N.C. App. 29 (2013)]

The review hearing then commenced with respondent mother representing herself. In its written order entered 13 October 2011, the trial court ordered DSS to cease reunification efforts and granted guardianship of the juvenile to the paternal grandparents. The court also ordered that no further review hearings would be held absent a motion from one of the parties. Respondent mother timely appealed to this Court.

## I

[1] In her first argument, respondent mother argues that the trial court erred when allowing her to waive counsel and proceed pro se because the appointment of a GAL precluded respondent mother from waiving counsel on her own behalf. Respondent mother argues that a parent's GAL appears as a substitute for the parent and not in merely an assistive capacity. According to respondent mother, any waiver of counsel must be by the GAL.

In an abuse, neglect, and dependency case, "the parent has the right to counsel and to appointed counsel in cases of indigency unless that person waives the right." N.C. Gen. Stat. § 7B-602(a) (2011). Further, a trial court "may appoint a guardian ad litem for a parent in accordance with G.S. 1A-1, Rule 17, if the court determines that there is a reasonable basis to believe that the parent is incompetent or has diminished capacity and cannot adequately act in his or her own interest." N.C. Gen. Stat. § 7B-602(c).

This Court addressed the role of a parent's GAL in *In re P.D.R.* Although *In re P.D.R.* involved the appointment of a GAL for a termination of parental rights proceeding under N.C. Gen. Stat. § 7B-1101.1(c) (2011), its analysis applies equally to N.C. Gen. Stat. § 7B-602(c). Both statutes allow for the appointment of a GAL for a parent when the parent is either (1) incompetent, or (2) has diminished capacity and cannot adequately act in his or her own interests.

This Court held in *In re P.D.R.*:

[W]e believe that the role of the GAL should be determined based on whether the trial court determines that the parent is incompetent or whether the trial court determines that the parent has diminished capacity and cannot adequately act in his or her own interest. Rule 17(e), which addresses the duties of a GAL for an incompetent person, should apply if the parent is incompetent—the role of the GAL should be one of substitution.

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On the other hand, if the parent has diminished capacity, N.C. Gen. Stat. § 7B-1101.1(e) should apply and the role of the GAL should be one of assistance.

224 N.C. App. at 469, 737 S.E.2d at 158.

In deciding whether to appoint a parental GAL, the court “must conduct a hearing in accordance with the procedures required under Rule 17 in order to determine whether there is a reasonable basis for believing that a parent is incompetent or has diminished capacity and cannot adequately act in his or her own interest. If the court chooses to exercise its discretion to appoint a GAL under N.C. Gen. Stat. § 7B-1101.1(c), then the trial court must specify the prong under which it is proceeding, including findings of fact supporting its decision, and specify the role that the GAL should play, whether one of substitution or assistance.” *Id.* at 470, 737 S.E.2d at 159, 2012.

Thus, whether a GAL appears in a substitutive capacity or an assistive capacity depends upon the basis for the appointment of the GAL. In this case, the trial court did not, of course, have the benefit of our decision in *In re P.D.R.*, so it did not specify whether it was acting under the incompetence prong or the diminished capacity prong. Nevertheless, the trial court specifically found in its Order on Review of the Permanent Plan that respondent mother “understands and appreciates the consequences of her decision to appear *pro se*, and comprehends the nature of the proceedings.” The court further found that respondent mother “has demonstrated the mental fitness” to waive her right to counsel.

In addition, a review of the record indicates that the GAL was *not* appointed because of concerns about respondent mother’s competency, but rather because personality issues impaired her ability to interact with others involved in the proceeding. The record shows, in addition, that the GAL and the trial court understood the GAL to be functioning in an assistive role because of the personality issues.

Based on the trial court’s findings and the record, we see no reason to remand for any further proceedings on this issue. Because the GAL was acting only in an assistive capacity, respondent mother had the ability to waive counsel, so long as that waiver was knowing and voluntary.



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With respect to her waiver, respondent mother contends that the trial court failed to conduct the proper inquiry into her decision to waive counsel because the court failed to address the third prong of N.C. Gen. Stat. § 15A-1242(3) (2011), which asks whether the defendant “[c]omprehends the nature of the charges and proceedings and the range of permissible punishments.”

Respondent mother’s argument, based on our first opinion in *In re P.D.R.*, was rejected by the Supreme Court, which held that N.C. Gen. Stat. § 15A-1242 is inapplicable outside of criminal cases. *In re P.D.R.*, 365 N.C. at 538, 723 S.E.2d at 338. The trial court must, however, still determine that the waiver of counsel is knowing and voluntary. *See, e.g.*, N.C. Gen. Stat. § 7B-1109(b) (2011) (providing in a termination of parental rights hearing, that “[i]n the event that the parents do not desire counsel and are present at the hearing, the court shall examine each parent and make findings of fact sufficient to show that the waivers were knowing and voluntary.”). *See also In re H.D.F., H.C., A.E.*, 197 N.C. App. 480, 495, 677 S.E.2d 877, 886 (2009) (holding that respondent father adequately waived his right to counsel where waiver was made knowingly and voluntarily).

Here, we believe the trial court’s inquiry was adequate to determine whether respondent mother knowingly and voluntarily waived her right to counsel. The trial court undertook a fairly lengthy dialogue with respondent mother to determine her awareness of her right to counsel and the consequences of waiving that right. Although respondent mother agreed that she was emotional due to the nature of the case, she demonstrated that she knew the nature of the proceedings as well as the factual aspects of the case. The trial court also questioned respondent mother’s GAL, who indicated that she had discussed the issue of proceeding pro se with respondent mother and that, in the GAL’s opinion, respondent mother was intelligent, she understood the ramifications of the hearing, and she had the capacity to make her own decisions. The GAL explained that respondent mother’s difficulties were more to do with her personality and not her cognitive abilities.

Based on our review of the record, we cannot conclude that respondent mother’s decision to waive counsel was involuntary or unknowing. Therefore, we conclude the trial court did not err in allowing respondent mother to waive counsel and proceed pro se.

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## II

**[2]** We now turn to respondent mother's substantive arguments regarding the trial court's order. First, respondent mother contends that the trial court made insufficient findings of fact to support its decision to cease reunification efforts.

Pursuant to the Juvenile Code, a trial court may direct the cessation of continued reunification efforts if the court makes findings of fact that the "efforts clearly would be futile or would be inconsistent with the juvenile's health, safety, and need for a safe, permanent home within a reasonable period of time[.]" N.C. Gen. Stat. § 7B-507(b)(1) (2011). Here, the trial court determined:

That the Court finds that pursuant to North Carolina General Statutes §7B-507, [DSS] is no longer required to make reasonable efforts in this matter to reunify this family as those efforts would clearly be futile and would be inconsistent with this child's health and safety, and need for a safe, permanent home within a reasonable amount of time. That due to the lack of progress of the parents in addressing the conditions that led to the removal of this child from their care, this child cannot be safely returned home now or in the next six months.

In support of this determination, the court made several findings of fact. Specifically, the court found that respondent mother "had made limited progress on all seven treatment goals" identified by respondent mother's therapist and had "not completed any of them." The court found that respondent parents attempted joint therapy on two occasions, but during the second occasion, they "engaged in a verbal confrontation that resulted in [the therapist] terminating the session and considering a call to 911 due to concerns that the altercation might become physically violent." The therapist "determined that she would be unable to provide joint counseling to the couple."

Additionally, the court found that Ava's therapist could not engage respondent parents in a dialogue about their daughter's needs "in large part due to the parents' inability to regulate their emotions long enough to participate in a meaningful discussion." Ava herself had "expressed considerable fear and anxiety with regard to being around her parents due to the ongoing conflict and domestic violence" between them. The court found, based on Ava's father's testimony, that "incidents of verbal altercations and conflict between [the parents] have been ongoing."

## IN RE A.Y.

[225 N.C. App. 29 (2013)]

The court found that respondent mother had engaged in “a pattern of poor parenting.” As part of that pattern, the court found that Ava “found a gun in [respondent mother’s] car and proceeded to play with it, until [respondent mother] took it from her, removed the magazine, and handed it back to the child.”

None of these findings of fact are challenged by respondent mother. Therefore, they are deemed to be supported by competent evidence and are binding on appeal. *Koufman v. Koufman*, 330 N.C. 93, 97, 408 S.E.2d 729, 731 (1991); *see also In re S.N.H. & L.J.H.*, 177 N.C. App. 82, 83, 627 S.E.2d 510, 512 (2006).

Respondent mother, however, challenges the following finding of fact as unsupported by the evidence:

8. That the Court heard testimony from both the volunteer Guardian ad Litem Deanne Mihevc and Social Worker Georgia Morris regarding an incident with the Respondent-parents in June of this year. The Court finds as fact that in the presence of the Guardian ad Litem and the Social Worker, both parents engaged in a verbal altercation wherein accusations of infidelity, blame with regard to [Ava] remaining out of the home, and general verbal aggression was witnessed for more than one hour, and that both the Guardian and the Social Worker considered a call to 911 as the altercation appeared to border on becoming physically violent.

We agree that this finding of fact is only partially supported by competent evidence. The record indicates that Ms. Mihevc and Ms. Morris did witness verbal aggression between the parents, but that the incident occurred in May 2011 rather than June 2011. In addition, there is no evidence that either woman considered making a call to 911 during the confrontation.

This error is, however, harmless. Even with the unsupported portions of this finding omitted, the court’s findings still establish that verbal aggression and significant conflict between the parents was continuing, including two significant episodes only three months before the hearing, and the parents had not successfully engaged in couples therapy. Respondent mother herself had made only limited progress on her treatment goals and had a pattern of poor parenting. Finally, the conflict and domestic violence continued to have a detrimental effect on Ava’s physical and emotional well-being.

## IN RE A.Y.

[225 N.C. App. 29 (2013)]

Given the trial court's binding findings of fact and the supported portion of finding of fact eight, we cannot conclude that the unsupported portions of finding of fact eight were material to the trial court's decision to cease reunification efforts. Consequently, we find no error in the trial court's decision to cease reunification efforts and award guardianship to the paternal grandparents.

## III

**[3]** Finally, respondent mother contends that the trial court erred when it ordered "[t]hat absent the filing of a Motion for Review by any party upon a substantial change of circumstances affecting the welfare and best interest of this juvenile, further reviews are waived." Respondent mother argues and DSS and the GAL concede that the trial court failed to make the findings of fact required by N.C. Gen. Stat. § 7B-906(b) (2011).

N.C. Gen. Stat. § 7B-906(b) provides:

Notwithstanding other provisions of this Article, the court may waive the holding of review hearings required by subsection (a) . . . if the court finds by clear, cogent, and convincing evidence that:

- (1) The juvenile has resided with a relative or has been in the custody of another suitable person for a period of at least one year;
- (2) The placement is stable and continuation of the placement is in the juvenile's best interests;
- (3) Neither the juvenile's best interests nor the rights of any party require that review hearings be held every six months;
- (4) All parties are aware that the matter may be brought before the court for review at any time by the filing of a motion for review or on the court's own motion; and
- (5) The court order has designated the relative or other suitable person as the juvenile's permanent caretaker or guardian of the person.

If a trial court fails to make findings of fact on these factors, the order

## IN RE DUNN

[225 N.C. App. 43 (2013)]

must be reversed and remanded for proper findings. *See In re R.A.H.*, 182 N.C. App. 52, 62, 641 S.E.2d 404, 410 (2007).

Here, the trial court's findings establish that Ava had been placed with her paternal grandparents since at least 10 March 2011, but did not specifically find that the placement had been for at least a year, as required for the first factor. The findings are sufficient with respect to the second and fifth factors, but none of the trial court's findings can be read as addressing the third and fourth factors. Consequently, we must reverse the portion of the order waiving future review hearings and remand for the trial court to reconsider whether future review hearings are needed and to make appropriate findings of fact to support its decision.

Affirmed in part; reversed and remanded in part.

Judges McGEE and McCULLOUGH concur.

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IN THE MATTER OF LACY DUNN

No. COA12-656

Filed 15 January 2013

**Sexual Offenders—request to terminate sex offender registration—jurisdiction—must be filed in district where convicted**

Petitioner's appeal from the denial of his petition for termination of his sex offender registration was dismissed. The superior court did not have jurisdiction to decide the petition because defendant was required to file his petition in the district where he was convicted of the offense.

Appeal by petitioner from order entered 6 December 2011 by Judge Gregory A. Weeks in Cumberland County Superior Court. Heard in the Court of Appeals 25 October 2012.

*Attorney General Roy Cooper, by Assistant Attorney General William P. Hart, Jr., for the State.*

*Parish & Cooke, by James R. Parish, for petitioner appellant.*

McCULLOUGH, Judge.

## IN RE DUNN

[225 N.C. App. 43 (2013)]

Lacy Dunn (“petitioner”) appeals from the trial court’s denial of his petition for termination of his sex offender registration. For the following reasons, we dismiss the appeal.

I. Background

Petitioner was convicted of attempted second-degree sex offense in Montgomery County on 3 November 1994 and initially registered as a sex offender in North Carolina on 2 January 1997. On 18 January 2011, petitioner petitioned Cumberland County Superior Court to terminate his sex offender registration pursuant to N.C. Gen. Stat. § 14-208.12A. Petitioner’s petition came on for hearing 6 December 2011 in Cumberland County Superior Court before the Honorable Gregory A. Weeks.

At the hearing, the State introduced evidence that petitioner was convicted on 21 September 2011 on charges of failing to register as a sex offender and possession of stolen property. In addition to the specific convictions introduced by the State, petitioner’s complete criminal record was entered into evidence for the trial court’s review. Petitioner’s criminal record indicates that petitioner was arrested, but not convicted, for multiple offenses for which he would have been required to register as a sex offender if he had been convicted, including second-degree rape.

Following the hearing, the trial judge entered an order denying petitioner the requested relief and requiring petitioner to maintain registration. The trial court’s denial was mandated based on its inability to find that “[s]ince the completion of [his] sentence . . . , the petitioner has not been arrested for any offense that would require registration under Article 27A of Chapter 14[,]” “[t]he petitioner is not a current or potential threat to public safety[,]” and “[t]he relief requested by petitioner complies with the provisions of the federal Jacob Wetterling Act . . . and any other federal standards applicable to the termination of a registration requirement or required to be met as a condition of the receipt of federal funds by the State.” Defendant appeals.

II. Analysis

On appeal, defendant challenges the constitutionality of N.C. Gen. Stat. § 14-208.12A(a1)(1) on grounds of due process and equal protection and additionally contends that the trial court abused its discretion in denying petitioner’s petition to terminate his sex offender registration. Upon review of the record, we are unable to reach the merits of this case.

## IN RE DUNN

[225 N.C. App. 43 (2013)]

“It is well-established that the issue of a court’s jurisdiction over a matter may be raised at any time, even for the first time on appeal or by a court *sua sponte*.” *State v. Webber*, 190 N.C. App. 649, 650, 660 S.E.2d 621, 622 (2008); *see also State v. Morrow*, 31 N.C. App. 592, 593, 230 S.E.2d 182, 183 (1976) (“It should be noted that this jurisdictional question was not raised before the able trial judge, nor was it raised in the briefs filed in this court. Nevertheless, where the lack of jurisdiction is apparent on the record, this court must note it *ex mero motu*.”). Where the court lacks jurisdiction, dismissal is appropriate. *Burgess v. Gibbs*, 262 N.C. 462, 465, 137 S.E.2d 806, 808 (1964).

In the present case, we find that the Cumberland County Superior Court did not have jurisdiction to decide petitioner’s petition to terminate his sex offender registration.

Pursuant to N.C. Gen. Stat. § 14-208.12A, where “the reportable conviction is for an offense that occurred in North Carolina, the petition shall be filed in the district where the person was convicted of the offense.” N.C. Gen. Stat. § 14-208.12A(a) (2011). As evident from the record, defendant was ordered to register as a sex offender as a result of his 3 November 1994 conviction in Montgomery County for attempted second-degree sex offense. Therefore, defendant was required to file his petition to terminate his sex offender registration in Montgomery County. Petitioner, however, filed his petition in Cumberland County. By statute, the Cumberland County Superior Court lacked jurisdiction to enter the 6 December 2011 order denying petitioner’s petition.

“When a court decides a matter without the court’s having jurisdiction, then the whole proceeding is null and void, *i.e.*, as if it had never happened.” *Hopkins v. Hopkins*, 8 N.C. App. 162, 169, 174 S.E.2d 103, 108 (1970).

### III. Conclusion

For the reasons set forth above, the appeal is dismissed and the order of the trial court is vacated.

Dismissed and vacated.

Judges GEER and STEPHENS concur.

## IN RE GRAY

[225 N.C. App. 46 (2013)]

IN RE FORECLOSURE OF REAL PROPERTY UNDER DEED OF TRUST FROM ROBERT H GRAY AND WIFE, AMY P GRAY, IN THE ORIGINAL AMOUNT OF \$360,800.00, AND DATED MARCH 5, 2007 AND RECORDED ON MARCH 19, 2007 IN BOOK 7404 AT PAGE 114, CABARRUS COUNTY REGISTRY TRUSTEE SERVICES OF CAROLINA, LLC, SUBSTITUTE TRUSTEE

No. COA12-854

Filed 15 January 2013

**1. Appeal and Error—standard of review—holder of valid debt—de novo**

The determination that respondents were the holder of a valid debt required judgment and the application of law and was reviewed on appeal *de novo*.

**2. Mortgages—foreclosure—determination of valid debt**

The trial court did not err by concluding that a valid debt existed in a foreclosure action where petitioners argued that respondents were required to show evidence that the underlying loan transaction was not accomplished in violation of any statute. The precedent relied upon by petitioners was distinguishable on its facts, petitioners merely argued conclusions without stating any specific factual allegations, no support for petitioner's contention was found in their precedent, and equitable defenses to the foreclosure should be asserted in an action to enjoin the foreclosure sale.

Appeal by petitioners from order entered 2 February 2012 by Judge A. Robinson Hassell in Cabarrus County Superior Court. Heard in the Court of Appeals 11 December 2012.

*Michael K. Elliot, Adam G. Breeding, and Maggie Decker of ELLIOT LAW FIRM, for petitioners.*

*Donald Richard Pocock, for JPMorgan Chase Bank, N.A..*

*Jeremy B. Wilkins, for Trustee Services of Carolina.*

ELMORE, Judge.

Robert H. Gray and Amy P. Gray (petitioners) appeal from an order entered 2 February 2012 allowing the foreclosure sale of their home. We affirm.



## IN RE GRAY

[225 N.C. App. 46 (2013)]

**I. Background**

In January 2007, petitioners entered into a “Mortgage Loan Origination Agreement” and a “Mortgage Brokerage Business Contract” with Financial Resources Mortgage, Inc. (FRM) to re-finance their existing home loan. Their mortgage broker and loan originator through FRM was Jason Davis. He secured a residential mortgage for petitioners through Lydian Private Bank (Lydian). On the day of the closing, a notary, John Frechette, acted as the signing agent. No attorney was present at the closing, but petitioners allege that Davis and Frechette advised them as to their rights and obligations under the mortgage. After the closing, the deed of trust securing the promissory note for the loan was recorded in Cabarrus County, and petitioners began making monthly mortgage payments.

A few months later, the note was transferred to Washington Mutual and then again sometime after that to JPMorgan Chase Bank, N.A. (respondent). On 17 January 2011, petitioners received a notice of default, reflecting respondent’s intention to foreclose. On 3 November 2011, the clerk of Cabarrus County Superior Court entered an order allowing the foreclosure sale. Petitioners then appealed to the trial court. After a *de novo* hearing on 23 January 2012, the trial court entered an order on 2 February 2012 allowing the foreclosure sale. Petitioners now appeal.

**II. Argument**

[1] On appeal, petitioners challenge the trial court’s finding that respondent “is the holder of the note sought to be foreclosed and the note evidences a valid debt owed by” petitioners. First, petitioners argue that this finding is actually a conclusion of law. We agree.

This Court has held that “any determination requiring the exercise of judgment or the application of legal principles is more properly classified a conclusion of law.” *N.C. State Bar v. Key*, 189 N.C. App. 80, 88, 658 S.E.2d 493, 499 (2008) (quotations and citations omitted). We conclude that the determination that respondents are the holder of a valid debt requires judgment and the application of law. As such, we will review accordingly, *see Id.* (“classification of an item within the order is not determinative, and, when necessary, the appellate court can reclassify an item before applying the appropriate standard of review.”). We review the trial court’s conclusions of law *de novo*. *See In re Foreclosure of a Deed of Trust Executed by Bradburn*, 199 N.C. App. 549, 551, 681 S.E.2d 828, 830 (2009) (“The trial court’s conclusions of law are reviewable *de novo*.”) (citation omitted).

## IN RE GRAY

[225 N.C. App. 46 (2013)]

[2] Turning now to petitioners' primary argument on appeal, petitioners contend that the trial court erred in concluding that a valid debt existed here, given this Court's ruling in *In re Bradburn*. According to petitioners, as a result of *In re Bradburn*, respondents were required to show evidence that the underlying loan transaction was not accomplished in violation of any statute. We reject petitioners' argument.

In *In re Bradburn*, the foreclosing party, Paragon, initiated a foreclosure proceeding in Iredell County. There, the clerk determined that Paragon was not licensed to act as a mortgage broker or mortgage banker at the time the Bradburns executed their note and deed of trust. Accordingly, the clerk concluded that Paragon had failed to prove the existence of a valid debt because the note was unenforceable. Paragon then appealed to the trial court. The trial court conducted a *de novo* hearing and also found that Paragon was unlicensed and in direct violation of N.C. Gen. Stat. § 53-243.03. The trial court then concluded that due to this violation, the note and deed of trust were illegal and unenforceable, and as a result, Paragon had failed to prove the existence of a valid debt. Paragon then appealed to this Court, arguing that the trial court erred in concluding that there was no valid debt. We held that a contract made in violation of a statute is not void *ab initio*, but rather, may be voidable. We then determined that "it is the province of the trial court, not the appellate court, to weigh the evidence and decide the equities. Therefore, we remand to the trial court to determine whether the Note and Deed of Trust are unenforceable under the facts and circumstances of this case." *In re Bradburn*, 199 N.C. App. at 556, 681 S.E.2d at 833.

First, we conclude that the facts of the case *sub judice* are distinguishable from *In re Bradburn*. Here, petitioners argue that Davis and Frechette engaged in the unauthorized practice of law, which renders the debt in question invalid. However, unlike the Bradburns, petitioners have not directed our attention to any specific statutory violation. Petitioners appear to reference N.C. Gen. Stat. § 84-4 (2011), which prohibits "any person or association of persons except active members of the Bar, for or without a fee or consideration, to give legal advice or counsel, perform for or furnish to another legal services[.]" However, petitioners have provided no factual basis for their argument, and the record is devoid of any specifics regarding the actions of Davis and Frechette which would amount to a violation of this statute. In short, we conclude that petitioners have merely argued conclusions without stating any specific factual allegations. As such, petitioners' argument must fail. We also note that on remand from this Court, the trial court in *In re Bradburn* nonetheless found

## IN RE GRAY

[225 N.C. App. 46 (2013)]

the debt to be valid, despite the indisputable statutory violation. Thus, assuming *arguendo* that such a violation had been sufficiently alleged and proved here, the case cited by petitioners is not an absolute bar to the validity of the debt in question.

Further, we also reject petitioners' contention that our ruling in *In re Bradburn* somehow created a requirement of foreclosing parties to "show evidence that the underlying loan transactions were not accomplished in violation of any statute if the purported debtor tenders evidence suggesting otherwise." We can find no support for petitioner's contention in our ruling in *In re Bradburn*.

In *In re Bradburn*, we simply held that the trial court erred in concluding that the statutory violation at issue rendered the debt void *ab initio*. We remanded to the trial court, in short, with instructions to weight the evidence presented during the *de novo* hearing and to determine if the debt was valid "under the facts and circumstances of th[e] case." *In re Bradburn*, 199 N.C. App. at 556, 681 S.E.2d at 833. Nowhere in that opinion did we mandate that Paragon, the foreclosing party, was required to present evidence to show that the statute in question was not violated.

Further, we note that foreclosure under a power of sale is strictly governed by statute. According to our General Statutes, so long as the clerk finds the existence of 1) valid debt, 2) default, 3) right to foreclose under the instrument, and 4) proper notice, then the sale may be authorized. *See* N.C. Gen. Stat. § 45-21.16 (2011). To require otherwise would place a great burden on our many clerks' offices. In accordance with this principle, this Court has held that because the foreclosure by power of sale statute "is designed to provide a less timely and expensive procedure than foreclosure by action, it does not resolve all matters in controversy between mortgagor and mortgagee. If respondents feel that they have equitable defenses to the foreclosure, they should be asserted in an action to enjoin the foreclosure sale under G.S. 45-21.34." *In re Helms*, 55 N.C. App. 68, 72, 284 S.E.2d 553, 555 (1981). Thus, again, petitioners' argument fails.

### **III. Conclusion**

In sum, we reject petitioners' arguments and conclude that the trial court did not err.

Affirmed.

Judges McGEE and HUNTER, Robert C. concur.

## IN THE COURT OF APPEALS

**McADOO v. UNIV. OF N.C. AT CHAPEL HILL**

[225 N.C. App. 50 (2013)]

MICHAEL McADOO, PLAINTIFF

v.

UNIVERSITY OF NORTH CAROLINA AT CHAPEL HILL; H. HOLDEN THORP IN HIS  
OFFICIAL CAPACITY AS CHANCELLOR OF THE UNIVERSITY OF NORTH CAROLINA AT CHAPEL HILL;  
AND NATIONAL COLLEGIATE ATHLETIC ASSOCIATION, DEFENDANTS

No. COA12-256

Filed 15 January 2013

**Contracts—breach—Athletics Scholarship Agreement—hypothetical and speculative injury—mootness**

Plaintiff former University of North Carolina football player did not raise any justiciable issues under the Athletics Scholarship Agreement (ASA) because: (1) he did not state facts making out a prima facie breach of the ASA as an express contract; (2) his alleged injury was too hypothetical and speculative to provide him with standing; and (3) his claims were moot. Plaintiff did not sustain any “injury in fact” because his scholarship was never terminated. Further, plaintiff accomplished the goal he sought to achieve, which was playing in the National Football League. Finally, the remedies plaintiff sought, both in compensation and declaratory judgment, were hypothetical in nature.

Appeal by Plaintiff from order entered 23 November 2011 by Judge Orlando F. Hudson, Jr. in Durham County Superior Court. Heard in the Court of Appeals 13 September 2012.

*Nelson Mullins Riley & Scarborough LLP, by Noah H. Huffstetler, III, Stephen D. Martin, and Elizabeth B. Frock, for plaintiff-appellant.*

*Attorney General Roy Cooper, by Special Deputy Attorney General Melissa L. Trippe and Assistant Attorney General Stephanie A. Brennan, for defendant-appellees the University of North Carolina at Chapel Hill and H. Holden Thorp.*

*Ellis & Winters LLP, by Paul K. Sun, Jr., Thomas H. Segars, and Jeremy N. Falcone, and Spencer Fane Britt & Browne LLP, by Jonathan F. Duncan and William C. Odle, for defendant-appellee National Collegiate Athletic Association.*

*Poyner Spruill LLP, by Robert F. Orr and John W. O'Hale, for Student Athlete Human Rights Project, amicus curiae.*

**McADOO v. UNIV. OF N.C. AT CHAPEL HILL**

[225 N.C. App. 50 (2013)]

HUNTER, JR., Robert N., Judge.

Michael McAdoo (“Plaintiff” or “McAdoo”) appeals from a 23 November 2011 order dismissing his amended complaint. Upon *de novo* review and based upon the record presented, we affirm the trial court’s order on the sole ground that the dispute does not present a justiciable controversy. This affirmation makes it unnecessary to reach the other issues raised by Plaintiff.

**I. Jurisdiction and Standard of Review**

This Court has jurisdiction to hear the instant appeal pursuant to N.C. Gen. Stat. § 7A-27(b) (2011). “The standard of review on a motion to dismiss under Rule 12(b)(1) for lack of jurisdiction is *de novo*.” *Fairfield Harbor Property Owners Ass’n, Inc. v. Midsouth Golf, LLC*, \_\_\_ N.C. App \_\_\_, \_\_\_, 715 S.E.2d 273, 280 (2011) (quotation marks and citation omitted). “ ‘Under a *de novo* review, the court considers the matter anew and freely substitutes its own judgment’ for that of the lower tribunal.” *State v. Williams*, 362 N.C. 628, 632-33, 669 S.E.2d 290, 294 (2008) (quoting *In re Greens of Pine Glen Ltd.*, 356 N.C. 642, 647, 576 S.E.2d 316, 319 (2003)).

All three Defendants filed Rule 12(b)(1) motions in this case raising lack of justiciability as a component of subject matter jurisdiction. “Concepts of justiciability have been developed to identify appropriate occasions for judicial action. . . . The central concepts often are elaborated into more specific categories of justiciability—advisory opinions, feigned and collusive cases, standing, ripeness, mootness, political questions, and administrative questions.” 13 Charles A. Wright et al., *Federal Practice and Procedure* § 3529, at 278-79 (2d ed. 1984). Thus, the trial court’s rulings dismissing Plaintiff’s claims for relief on the basis of “standing” and “mootness” are necessarily incorporated into its decision to dismiss the complaint on “justiciability” grounds.

In *Neuse River Foundation, Inc. v. Smithfield Foods, Inc.*, 155 N.C. App. 110, 574 S.E.2d 48 (2002), our Court discussed “standing” as a subset of the justiciability doctrine and compared its federal and state counterparts as follows:

Standing is among the “justiciability doctrines” developed by federal courts to give meaning to the United States Constitution’s “case or controversy” requirement. U.S. Const. Art. 3, § 2. The term refers to whether a party has a sufficient stake in an otherwise

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justiciable controversy so as to properly seek adjudication of the matter. *Sierra Club v. Morton*, 405 U.S. 727, 731-32, 92 S.Ct. 1361, 1364-65, 31 L.Ed.2d 636, 641 (1972). The “irreducible constitutional minimum” of standing contains three elements:

(1) “injury in fact”—an invasion of a legally protected interest that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action of the defendant; and (3) it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision. *Lujan v. Defenders of Wildlife*, 504 U.S. [555,] 560–61 [(1992)].

North Carolina courts are not constrained by the “case or controversy” requirement of Article III of the United States Constitution. Our courts, nevertheless, began using the term “standing” in the 1960s and 1970s to refer generally to a party’s right to have a court decide the merits of a dispute. *See, e.g., Stanley, Edwards, Henderson v. Dept. of Conservation & Development*, 284 N.C. 15, 28, 199 S.E.2d 641, 650 (1973).

*Id.* at 114, 574 S.E.2d at 51–52.

Like “standing,” “mootness” is another subset of the justiciability doctrine. Our Court, for example, in *Hindman v. Appalachian State Univ.*, \_\_\_ N.C. App. \_\_\_, 723 S.E.2d 579 (2012), recently applied the mootness doctrine as follows:

Although plaintiffs argue that a mere declaration of a past wrong is a sufficient basis for a declaratory judgment action, it is still true that actions filed under the Declaratory Judgment Act, N.C. Gen. Stat. §§ 1-253 through -267 (2005), are subject to traditional mootness analysis. A case is considered moot when a determination is sought on a matter which, when rendered, cannot have any practical effect on the existing controversy. Typically, courts will not entertain such cases because it is not the responsibility of courts to decide abstract propositions of law.

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*Id.* at \_\_\_\_, 723 S.E.2d at 581 (quoting *Citizens Addressing Reassignment and Educ., Inc. v. Wake Cty. Bd. of Educ.*, 182 N.C. App. 241, 246, 641 S.E.2d 824, 827 (2007) (quotation marks omitted).

## II. Factual History

McAdoo was a highly-recruited high school football player from Antioch, Tennessee. He received a football scholarship to the University of North Carolina at Chapel Hill (“UNC”), a member of the Atlantic Coast Conference (“ACC”) of the National Collegiate Athletic Association (“NCAA”).<sup>1</sup> After signing the relevant form agreements and enrolling, McAdoo played football for UNC during the 2008 and 2009 seasons.

In order to “participate in intercollegiate competition,” McAdoo signed a document entitled “Student-Athlete Statement—Division I” (the “Statement”) on 31 July 2008. The Statement contains the following affirmations:

You affirm that your institution has provided you a copy of the Summary of NCAA Regulations or the relevant sections of the Division I Manual and that your director of athletics (or his or her designee) gave you the opportunity to ask questions about them.

You affirm that you meet the NCAA regulations for student-athletes regarding eligibility, recruitment, financial aid, [and] amateur status[.]

....

You affirm that you have reported to the director of athletics or his or her designee of your institution any violations of NCAA regulations involving you and your institution.

You affirm that you understand that if you sign this statement falsely or erroneously, you violate NCAA legislation on ethical conduct and you will further jeopardize your eligibility.

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1. The NCAA is a private, voluntary association that administers intercollegiate athletic competition between higher education institutions in 23 sports. It has approximately 1,273 members, 1,066 of which are higher education institutions. 340 schools comprise Division I of the NCAA, 290 schools are in Division II, and 436 schools make up the NCAA's Division III. *About the NCAA*, Nat'l Collegiate Athletic Ass'n, <http://www.ncaa.org/wps/wcm/connect/public/ncaa/about+the+ncaa/membership+new> (last visited 4 January 2013).

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The Statement further cautions that:

[b]efore you sign this form, you should read the Summary of NCAA Regulations provided by your director of athletics or his or her designee or read the bylaws of the NCAA Division I Manual that deal with your eligibility. If you have any questions, you should discuss them with your director of athletics or your institution's compliance officer, or you may contact the NCAA[.]

The Statement specifically directs student-athletes to examine NCAA Bylaws 10, 12, 13, 14, 14.1.3.1, 15, 16, 18.4, and 31.2.3, which deal with player eligibility. When Plaintiff signed the Statement, he affirmed “[his] institution has provided [him] with a copy of the Summary of NCAA Regulations or the relevant sections of the Division I Manual and that [his] director of athletics (or his or her designee) gave [him] the opportunity to ask questions about them.” Plaintiff also signed a second similar statement on 6 August 2009.

All student-athletes at UNC also have access to a Student-Athlete Handbook (the “Handbook”) which summarizes, *inter alia*, relevant UNC, ACC, and NCAA regulations and standards of conduct. The Handbook states:

[i]t shall be the responsibility of every student at the University of North Carolina at Chapel Hill to obey and support the enforcement of the Honor Code, which prohibits lying, cheating, or stealing when these actions involve academic processes or University, student, or academic personnel acting in an official capacity.

The Handbook specifically addresses plagiarism as a “serious academic offense”:

Normally, it is considered cheating if you have unauthorized help on examinations or course work. Plagiarism is submitting a paper or project written by someone else or paraphrasing someone else's ideas and claiming the material as your own.

Scholastic integrity is strongly supported not only by the University, but also by the student body through the University's Honor System. If you have questions regarding the Honor System, check with your professor or an academic counselor before turning in your paper in



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question. Students have been accused of plagiarism simply because they didn't understand that when paraphrasing someone else's work, they must still acknowledge the source.

Because this has been an area of confusion for some students, general tips on how to avoid plagiarism have been included in the Academics Section of this handbook.

Another section of the Handbook deals with unintended plagiarism, stating "[o]ccasionally, scholastic dishonesty occurs as the result of a lack of information or misinformation. Everyone knows cheating on an exam is dishonest; however, students have, on occasion, turned in papers which they thought were acceptable only to find they were accused of plagiarism." The Handbook clarifies that while "[t]utors are available in select subjects[,] " "[t]hey are there to help you understand your assignments, not to do your work for you." UNC also provided Plaintiff with a summary of NCAA regulations in the Handbook.

During McAdoo's time at UNC, in addition to room, board, and in-state tuition, he received tutoring from Ms. Jennifer Wiley ("Wiley"), a UNC student paid by UNC to assist McAdoo in his studies. Wiley was assigned to Plaintiff for several classes from fall 2008 to summer 2009, including African Studies ("AFRI") 266 and Afro-American Studies ("AFAM") 428.

During the summer of 2009, Wiley ceased working with the Academic Support Program. The Academic Support Program subsequently assigned Plaintiff a new student tutor. In July 2009, while completing a paper for Swahili ("SWAH") 403 during Summer Session II, Plaintiff sought out Wiley's help on the footnotes and Works Cited sections even though she was no longer his assigned tutor. Specifically, on 15 July 2010, he e-mailed Wiley his paper, stating "the words in bold is what need to be cited" (sic). Plaintiff also included a list of eight websites and one book numbered by where they needed to be cited in his paper. Wiley completed the footnotes and Works Cited sections. Later that night, she e-mailed the finished paper to Plaintiff, saying, "i think i did this right...i used APA citations for the bold stuff...and i made the works cited for all those websites...hope this helps!" Plaintiff then submitted the finished paper to his professor.

In June 2010, the NCAA began investigating reports that UNC football players had received improper benefits from sports agents. As part of the investigation, NCAA officials interviewed McAdoo

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about a weekend trip to Washington, D.C., during which he unknowingly received improper benefits valued at \$99.<sup>2</sup>

This investigation went in an unexpected direction when UNC began to inspect the players' e-mail communications for evidence of improper sports agent contacts. When UNC examined McAdoo's e-mails, it found reason to believe Wiley's assistance to McAdoo may have violated the school's academic honesty standards. UNC then interviewed McAdoo on 24 August 2010 and 29 August 2010 about Wiley's assistance. Plaintiff described the help Wiley provided on his SWAH 403 paper. He said this level of assistance was characteristic of the help she provided throughout his time working with her.

Following this discovery, UNC then submitted a hypothetical scenario to the NCAA's Academic and Membership Affairs ("AMA") Department theoretically describing Wiley's assistance on Plaintiff's SWAH 403 paper. AMA staff determined a violation of NCAA Bylaw 10.1-(b) had occurred. NCAA Bylaw 10.1-(b) states that prohibited unethical conduct includes "[k]nowing involvement in arranging for fraudulent academic credit or false transcripts for a prospective or an enrolled student-athlete." Based on the interviews with Plaintiff, UNC believed Plaintiff had also previously violated NCAA Bylaw 10.1-(b) in other instances.

As a member of the NCAA, UNC must comply with NCAA regulations. NCAA regulations, including the NCAA constitution and bylaws, are set forth in its annually-published Division I Manual. According to NCAA Bylaw 10.4, student-athletes who violate NCAA Bylaw 10.1 are ineligible for further intercollegiate competition. NCAA Bylaw 14.11.1 provides that "[i]f a student-athlete is ineligible under [NCAA regulations], the institution shall be obligated to apply immediately the applicable rule and to withhold the student-athlete from all intercollegiate competition." The member institution (the "Institution") must then report that determination to the NCAA. NCAA Bylaw 14.12.1 allows the Institution to "appeal to the Committee on Student-Athlete Reinstatement for restoration of the student's eligibility, provided the [I]nstitution concludes that the circumstances warrant restoration of eligibility."

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2. In April 2010, Plaintiff traveled for a weekend to Washington, D.C. with two teammates. Plaintiff shared a room with a teammate for two nights at a hotel that cost \$89 per night. During the trip, one of Plaintiff's teammates told him the teammate would pay for the weekend. Unbeknownst to Plaintiff, however, the trip was actually paid for by Todd Stewart ("Stewart"), a "prospective agent." During the trip, Stewart also helped Plaintiff obtain free entry into a night club that had a \$10 cover charge.

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According to the Policies and Procedures (the “Policies and Procedures”) of the Committee on Student-Athlete Reinstatement (the “Committee”), “[t]he [I]nstitution is responsible for developing complete, accurate, and thorough information prior to submitting a reinstatement request.” After the Committee staff “has reviewed the [I]nstitution’s request and has completed its research,” the staff will approve, conditionally approve, or deny the request.

In accordance with NCAA regulations, on 2 September 2010 UNC declared Plaintiff ineligible to play intercollegiate athletics and withheld him from the first three games of the 2010 season. UNC reported its decision to the NCAA and also referred the case to the student-run UNC Honor Court. On 28 September 2010, Richard A. Baddour (“Baddour”), UNC’s Director of Athletics, submitted to Jennifer Henderson (“Henderson”), the NCAA Director of Student-Athlete Reinstatement, UNC’s petition to reinstate Plaintiff’s eligibility (the “Petition”). In the Petition, UNC referenced three violations of NCAA regulations: (1) Plaintiff’s receipt of tutoring from Wiley valued at \$11 (for one hour of assistance on the SWAH 403 paper); (2) Plaintiff’s receipt of \$99 in benefits from a prospective agent in Washington, D.C.; and (3) academic fraud under NCAA Bylaw 10.1-(b).

In the Petition, UNC specifically stated “the academic assistance provided to Mr. McAdoo throughout the Fall of 2008 and Summer of 2009 has, at least in some instances, crossed the line into academic fraud, as interpreted by AMA staff under Bylaw 10.1-(b).” UNC referenced Wiley’s assistance in AFRI 266, AFAM 428, and SWAH 403. Still, UNC contended “it was reasonable for Mr. McAdoo to assume that the type of assistance offered and provided to him by his formally-assigned tutor in the Academic Support Program would be permissible” and that “Mr. McAdoo was not aware that the assistance being provided him by the institutional staff member was improper.” UNC told the NCAA “the facts surrounding the academic fraud have been submitted to the UNC Honor Court to be processed according to their policies for all students.” UNC also said it would update the NCAA as the honor cases progressed.

On 4 October 2010, Baddour submitted UNC’s revised report to Henderson. In this report, Baddour informed the NCAA that the UNC Student Attorney General did not bring honor charges against Plaintiff for AFAM 428, but did file honor charges relating to AFRI 266 and SWAH 403.

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On 14 October 2010, UNC's Undergraduate Honor Court found Plaintiff not guilty of honor charges related to AFRI 266, but guilty with regard to the SWAH 403 paper. The Honor Court used the standard of "beyond a reasonable doubt." The Honor Court focused on the text of e-mails between Wiley and Plaintiff. For instance, it found Wiley implied she had completed Plaintiff's assignment when she stated "i think i did this right[,] "i used APA citations for the bold stuff[,] "and "i made the works cited for all those websites[.]" It sanctioned Plaintiff with academic probation for Fall 2010, suspension for Spring 2011, and a failing grade on the assignment in SWAH 403. Due to his academic probation, Plaintiff was not permitted to play football for the rest of the Fall 2010 season. But for the NCAA sanctions, McAdoo would have been eligible to play football during the 2011 fall season, his senior year. In a series of e-mails from October to early November 2010, UNC officials notified the NCAA of the outcome of Plaintiff's honor trial.

Unfortunately for McAdoo, the Committee staff disagreed with UNC's reinstatement request. The Committee staff weighed all the evidence UNC provided to make its eligibility determination. On 12 November 2010, the NCAA released a Student-Athlete Reinstatement Case Report (the "Case Report") determining Plaintiff was permanently ineligible to play intercollegiate athletics due to violations of (1) NCAA Bylaw 10.1(b) (academic fraud); and (2) NCAA Bylaws 12.3.1.2, 16.02.3, and 16.11.2.1 (extra benefits). The Case Report stated that under NCAA regulations, Plaintiff "received impermissible assistance on multiple assignments across several academic terms." It specifically recounted the details surrounding the SWAH 403 paper.

The NCAA Committee on Student-Athlete Reinstatement maintains a clearly-outlined appeal procedure. After the Committee staff makes an initial eligibility determination, the Institution has 30 days to accept the decision or to appeal it to the full Committee. Appeals of reinstatement decisions generally involve a teleconference. According to the Committee's Policies and Procedures, "[t]he committee requires a minimum of 48 hours to review documentation prior to a teleconference appeal or prior to rendering a decision for an appeal via paper review." "For all appeals handled by the student-athlete reinstatement committee, all factual and interpretive disputes must be resolved prior to the division committee reviewing the matter." The Institution is provided with a copy of all information the Committee uses to make its decision. After the teleconference, the Committee members deliberate in private and reach a decision by

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majority vote. The chair of the Committee then notifies the student-athlete reinstatement lead administrator, who in turn notifies the Institution. The Committee's determination is final.

UNC, acting on its own behalf and on behalf of McAdoo, timely appealed the staff determination to the full Committee. On 14 December 2010, the full Committee held a telephone Reinstatement Hearing (the "Hearing") with both McAdoo and UNC participating. Although UNC had its own attorney present, Plaintiff did not have independent legal representation. The NCAA, UNC, and Plaintiff were each allotted 10 minutes to make a statement, followed by questioning and 5 minute closing statements. NCAA officials made it clear the Committee was not reviewing UNC's initial determination that Plaintiff violated NCAA Bylaws, but rather its own 12 November 2010 decision not to reinstate Plaintiff's eligibility. At the beginning of the Hearing, an NCAA official further stated:

[T]he appeal procedures require that all factual disputes must be resolved prior to the committee's review of this matter. . . . [I]f the facts appear to be in dispute the call will end since the staff's decision was made on agreed to the fact [sic] and that decision is being reviewed by this committee as an appellate body. The members of the committee have read all of the papers submitted by the Staff in the institution and are familiar with the facts of this case.

Another NCAA official then recounted the allegation of academic fraud, as initially described by UNC:

[O]n several occasions during the 2008-09 academic year, Mr. McAdoo was assigned and worked with at least one (1) specific tutor. On several papers during this time Mr. McAdoo has admitted to receiving help from the tutor in the form of paper formatting, fixing grammatical errors and the creation of papers [sic] citations. Specific instances—number of instances—during the academic year are unknown, however, this was part of the reported violation from the institution.

The official went on to describe Wiley's assistance to Plaintiff on the SWAH 403 paper.

UNC later described how Plaintiff had only been convicted of one Honor Code violation: "One fact you should know about that is that

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our honor court disagrees [with the NCAA determination]. They did not see any reason what so ever to bring a charge about improper help in AFAM 428 and they charged in AFRI 266 but found that the help was permissible.”

At the Hearing, UNC also vigorously argued Plaintiff did not “knowingly” violate the NCAA bylaws:

This is not a case, we don’t believe, in which Michael actively sought out impermissible help. He was a freshman. He had no reason to think that Jennifer [Wiley] would do something different than what was appropriate. He was essentially accepting the help that Jennifer [Wiley] was offering. . . . Michael was concerned about his academic responsibility. He was worried about plagiarism and he is keeping faith with the academic mission of his time in college.

Plaintiff then presented his case and argued:

I never thought for a second that we were ever breaking any rules. I was working hard and she was there to make sure I was on the right track. . . . My biggest concern was trying to make sure I would not plagiarize so that’s why I wanted her to check all of the citations.

The Committee then considered “all of the mitigation present in this case including the institution’s contention that Mr. McAdoo did not intentionally commit[] academic fraud.” However, the Committee disagreed with the UNC Honor Court, concluding “Mr. McAdoo did take deliberate action and he knew what he was doing.” The NCAA based its decision on the fact that:

at some point during the full academic year that Mr. McAdoo received the impermissible academic assistance from this tutor he should have recognized that this individual was providing above and beyond what other tutors were. A fact Mr. McAdoo himself recognized at the time. When Mr. McAdoo ran short on time with an incomplete assignment he did not turn for help to the tutor to whom he had been assigned [and] instead he sought out an individual whom he know [sic] would complete the paper. Based on these factors staff believes Mr. McAdoo had culpability in this violation.

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In making its final decision, the Committee concluded there were no disputed factual issues requiring resolution. Based upon the evidence presented by the Committee staff and UNC, the full Committee affirmed the staff's decision to permanently disqualify McAdoo from playing college football.

In August 2011, before the start of his senior year, Plaintiff applied for and was declared eligible for the supplemental draft in the National Football League ("NFL").<sup>3</sup> Although Plaintiff was not drafted in the supplemental draft, he signed a contract with the Baltimore Ravens as a free agent. He received the NFL minimum yearly salary of \$270,000. By signing a professional contract, McAdoo was no longer eligible to play college football. *See* NCAA Bylaw 12.2.5.

**III. Procedural History**

On 1 July 2011, Plaintiff filed a verified complaint and petition for writ of mandamus, as well as a motion for preliminary injunction, against UNC, UNC's Chancellor H. Holden Thorp ("Thorp"), and the NCAA in Durham County Superior Court. On 6 July 2011, Plaintiff filed a verified amended complaint in Durham County Superior Court. In his complaints, Plaintiff alleged claims for: (1) breach of contract as to UNC; (2) breach of fiduciary duty as to UNC and Thorp; (3) breach of contract as to the NCAA and UNC; (4) negligence as to the NCAA; (5) gross negligence as to the NCAA; (6) libel as to the NCAA; (7) tortious interference with contract as to the NCAA; (8) declaratory judgment for violations of the North Carolina Constitution; (9) a mandatory injunction or writ of mandamus as to UNC and Thorp; (10) entitlement to preliminary and permanent injunctive relief as to UNC and Thorp; and (11) entitlement to preliminary and permanent injunctive relief as to the NCAA.

Plaintiff alleged he is "gifted with the physical characteristics (size, strength, speed, quickness, agility) and developed skills to enable him to compete as a football player at a very high level." Plaintiff believes if he

[had] continue[d] to progress and improve as a football player as expected if permitted to play football at UNC in the 2011 season, there [would have been] a significant possibility that [he] would [have been] a prospective draft selection in the 2012 National Football League

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3. The NFL's supplemental draft allows qualified underclassmen to participate in the draft when they had not requested timely entry into the regular draft.

(“NFL”) Draft, or that [he] would [have been] signed as a free agent to play professional football following the 2011 NCAA season.

On 20 July 2011, the Durham County Superior Court entered an order denying Plaintiff’s petition for writ of mandamus and motion for preliminary injunction. Defendants filed motions to dismiss on 6 September 2011. On 23 November 2011, the Durham County Superior Court entered an order dismissing the amended complaint. Plaintiff filed a timely notice of appeal on 29 November 2011.

#### **IV. Analysis**

On appeal, Plaintiff makes two arguments: (i) the trial court erred in dismissing his case under North Carolina Rule of Civil Procedure 12(b)(6) because Plaintiff has stated claims upon which relief may be granted; and (ii) the trial court erred in granting Defendants’ motions to dismiss under North Carolina Rule of Civil Procedure 12(b)(1) because his claims are justiciable. Plaintiff’s claims challenge the actions of (i) UNC, and Thorp, in his official capacity as UNC’s Chancellor; and (ii) the NCAA. Upon review, we affirm the trial court’s decision because Plaintiff has not raised justiciable issues concerning any of these parties.

##### **A. UNC and Thorp**

Plaintiff does not raise a justiciable issue against either UNC or Thorp under (i) the Athletics Scholarship Agreement (the “ASA”) or (ii) the Instrument of Student Judicial Governance (the “Instrument”).

##### **1. The Athletics Scholarship Agreement**

Plaintiff does not raise any justiciable issues under the ASA because: (i) he has not stated facts making out a prima facie breach of the ASA as an express contract; (ii) his alleged injury is too hypothetical and speculative to provide him with standing; and (iii) his claims are now moot.

On 6 February 2008, Plaintiff and his mother, Janai D. Shelton, signed an ASA which provided Plaintiff with full financial aid for the 2008–09 academic year covering tuition, fees, room, board and books. The ASA provides, in part, the following:

3. This award is not automatically renewed. Per NCAA regulations, scholarships are awarded on a one-year



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basis . . . and are generally renewed for 4 academic years (pending the recommendation of the head coach at the end of each academic year), unless otherwise described above. Your eligibility for renewal of this award is subject to UNC and NCAA renewal policies at the end of the term (which include, but are not limited to, your fulfillment of UNC, ACC, and NCAA progress-toward-degree requirements).

. . . .

ACCEPTANCE *By signing this offer of financial aid, I understand that:*

1. I will become ineligible for intercollegiate competition if I receive any financial assistance other than that authorized by the NCAA and approved by the Compliance Office and the Office of Scholarships and Student Aid. It is my responsibility to make these offices aware of any outside aid for which I am eligible. I understand that my athletics scholarship may be reduced or cancelled if I receive institutional and/or outside financial aid.

. . . .

4. If I voluntarily withdraw or am suspended from UNC, my athletics scholarship will be discontinued. Reinstatement of my athletics scholarship is not guaranteed upon my return to UNC.

5. My scholarship may be reduced or cancelled at any time if I: a) become ineligible for intercollegiate competition in my sport, b) voluntarily withdraw from my sport, . . . d) engage in misconduct warranting disciplinary penalty (e.g., violate team, UNC, ACC, or NCAA regulations, am arrested for or convicted of a misdemeanor or felony, etc.).

. . . .

7. I must conduct myself in accordance with all UNC, ACC, and NCAA regulations. . . . Failure to follow these regulations may result in the cancellation of this award.

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8. Any modification or cancellation of this award must be in compliance with UNC, ACC, and NCAA legislation.

Subsequently, Plaintiff applied for admission to UNC and was accepted. Per the ASA, he received a full athletic scholarship for the 2008–09 academic year. On 27 June 2008, Shirley A. Ort (“Ort”), UNC’s Associate Provost and Director of the Office of Scholarships and Student Aid, sent Plaintiff a letter confirming the terms of the ASA. In addition to the financial benefits outlined above, the letter provided that because Plaintiff was a resident of Tennessee at the time of his application to UNC, he would receive in-state residency status for tuition purposes. The Ort letter re-emphasized that “your athletic scholarship may be immediately reduced or cancelled if you fail to meet UNC, ACC, or NCAA continuing eligibility requirements; become ineligible to participate in your sport; . . . or engage in misconduct warranting disciplinary penalty.” Ort renewed Plaintiff’s scholarship on 19 June 2009 and 30 June 2010 using similar form letters.

**i. No Breach of ASA**

Plaintiff has not alleged UNC or Thorp breached the terms of the ASA.

In North Carolina, a plaintiff must allege injury to a contractual interest to have standing to maintain a contract-based claim. *See Beachcomber Props., L.L.C. v. Station One, Inc.*, 169 N.C. App. 820, 824, 611 S.E.2d 191, 194 (2005) (holding that a plaintiff had no injury in fact, and consequently no standing, when it had no enforceable contract right against the defendant).

In the present case, Plaintiff has alleged no such injury under the terms of the ASA. According to the ASA, UNC promised to pay Plaintiff’s full tuition, fees, room, board, and books in exchange for his promise to, *inter alia*, “conduct [himself] in accordance with all UNC, ACC, and NCAA regulations[,]” including UNC’s Honor Code and the NCAA bylaws.

Even if UNC and the NCAA correctly determined Plaintiff violated UNC regulations and the NCAA Bylaws, nothing in the record indicates UNC terminated his athletic scholarship. Rather, UNC placed Plaintiff on academic probation for one semester, suspended him for one semester, and gave him a failing grade on his SWAH 403 assignment. Thus, after examining the express contract between the parties, we conclude Plaintiff cannot show any bargained-for monetary loss under the ASA which is attributable to the acts of UNC or Thorp.

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**ii. Injury Too Speculative for Standing**

Any further injuries Plaintiff alleges are too hypothetical and speculative to provide him with standing.

The law of North Carolina provides:

A party to a contract who is injured by another's breach of the contract is entitled to recover from the latter damages for . . . only such injuries as are the direct, natural, and proximate result of the breach or which, in the ordinary course of events, would likely result from a breach and can reasonably be said to have been foreseen, contemplated, or expected by the parties at the time when they made the contract as a probable or natural result of a breach.

*Bloch v. The Paul Revere Life Ins. Co.*, 143 N.C. App. 228, 237, 547 S.E.2d 51, 58 (2001) (quotation marks and citation omitted). "As part of its burden, the party seeking damages must show that the amount of damages is based upon a standard that will allow the finder of fact to calculate the amount of damages with reasonable certainty." *Olivetti Corp. v. Ames Business Systems, Inc.*, 319 N.C. 534, 547-48, 356 S.E.2d 578, 586 (1987). Therefore, speculative damages that cannot be calculated with reasonable certainty are not recoverable.

Here, McAdoo contends his damages are not limited to the loss of his scholarship because of the existence of "special damages." Specifically, he argues that had UNC, Thorp and the NCAA not breached the contract by unfairly preventing him from playing football his senior year, then his subsequent earnings as an NFL football player would have been greater than those he actually obtained as a free agent. Plaintiff's counsel, at oral arguments, stated that expert witnesses were prepared to present evidence of these "special damages."

Nonetheless, when disappointed student-athletes have presented similar arguments to courts, both in this state and elsewhere, these claims for damages have been rejected as speculative. *See Arendas v. N.C. High Sch. Athletic Ass'n*, \_\_\_ N.C. App. \_\_\_, 718 S.E.2d 198 (2011).

In *Arendas*, it was discovered that two students on a high school men's basketball team did not reside in the proper school district. *Id.* at \_\_\_, 718 S.E.2d at 199. Their school's state championship win was vacated, and they were declared ineligible to participate in high

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school athletics for one year. *Id.* at \_\_\_, 718 S.E.2d at 199. Although the student-plaintiffs in *Arendas* contended “the forfeiture of the Championship *could cause* possible harm in the form of lost scholarships, lost job opportunities, and lost college prospects[,]” our Court held the students did not have standing to bring suit because “these possibilities were all hypothetical.” *Id.* at \_\_\_, 718 S.E.2d at 200. Like in *Arendas*, we determine Plaintiff’s alleged damages are too hypothetical and speculative to survive a motion to dismiss.

Similarly, although non-binding on this Court, other jurisdictions have rejected these types of damage claims as speculative. *See, e.g., Butler v. NCAA*, No. 06-2319 KHV, 2006 WL 2398683, at \*4 (D. Kan. Aug. 15, 2006) (“Therefore, he will not suffer irreparable injury through loss of a scholarship. As for the loss of an opportunity for a professional football career, such harm is speculative.”); *Colorado Seminary (University of Denver) v. NCAA*, 417 F. Supp. 885, 895 (D. Colo. 1976) (“While the Court might agree that the deprivation of a previously granted scholarship would invoke the protections of procedural due process[,] . . . the interest in future professional careers must nevertheless be considered speculative and not of constitutional dimensions.”); *Bowers v. NCAA*, 118 F. Supp. 2d 494, 509-510 (D. N.J. 2000) (“[T]he road to a professional football career is long and circuitous, and [the plaintiff] has not gone down that road far enough to submit such a fanciful damage claim to a fact finder. Accordingly, [he] may not pursue damages for the loss of a potential professional athletic career.”).

Furthermore, the cases cited by Plaintiff are factually distinguishable. *See Bloom v. NCAA*, 93 P.3d 621 (Colo. App. 2004); *Oliver v. NCAA*, 920 N.E.2d 203 (Ohio Ct. Com. Pl. 2009), *vacated pursuant to settlement* (Sept. 30, 2009). In *Bloom*, the plaintiff sought a declaratory judgment and injunctive relief allowing him to maintain pre-existing endorsements, modeling contracts, and media activities stemming from his Olympic-level skiing career even though he was now an NCAA football player. *Bloom*, 93 P.3d at 622. Since Bloom’s injury arose from a dispute concerning *pre-existing* contracts, his injury was concrete and particularized. *See id.* Similarly, in *Oliver*, the plaintiff alleged an injury not to his future career, but to his present right to hire an attorney to represent his interests. *Oliver*, 920 N.E.2d at 207-08. In sum, the alleged injury in both *Bloom* and *Oliver* did not concern future career prospects and earning potential. In any event, those cases are not binding on this Court. *See Morton Buildings, Inc. v. Tolson*, 172 N.C. App. 119, 127, 615 S.E.2d 906, 912

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(2005) (“[W]hile decisions from other jurisdictions may be instructive, they are not binding on the courts of this State.”).

Consequently, Plaintiff’s claims are non-justiciable because his alleged damages are too speculative and hypothetical to provide him with standing.

**iii. Mootness**

Additionally, any claims Plaintiff makes under the terms of the ASA are now moot.

Our Supreme Court has succinctly stated the test for mootness:

Whenever, during the course of litigation it develops that the relief sought has been granted or that the questions originally in controversy between the parties are no longer at issue, the case should be dismissed, for courts will not entertain or proceed with a cause merely to determine abstract propositions of law.

*In re Peoples*, 296 N.C. 109, 147, 250 S.E.2d 890, 912 (1978).

In North Carolina, a plaintiff’s actions subsequent to the start of litigation can render the plaintiff’s claims moot. For instance, in *Messer v. Town of Chapel Hill*, 346 N.C. 259, 485 S.E.2d 269 (1997), a landowner brought suit against a town for a re-zoning decision that allegedly deprived the landowner of “a practical use and a reasonable value” for his land. *Id.* at 261, 485 S.E.2d at 270 (quotation marks and citation omitted). Because the landowner later sold the land for \$1,500,000, the Supreme Court determined the claim was moot. *Id.*

In the present case, Plaintiff initially made claims for money damages, declaratory judgment, and mandamus or injunctive relief. Since Plaintiff has become a professional football player with the Baltimore Ravens, under NCAA regulations he can no longer play football at an intercollegiate level.<sup>4</sup> Thus, Plaintiff concedes his claims for mandamus and injunctive relief to require UNC and the NCAA to declare him eligible to play intercollegiate football are now moot. Nonetheless, Plaintiff argues his claims for money damages and declaratory judgment are not moot.

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4. NCAA Bylaw 12.2.5 provides that “[a]n individual shall be ineligible for participation in an intercollegiate sport if he or she has entered into any kind of agreement to compete in professional athletics, either orally or in writing, regardless of the legal enforceability of that agreement.”

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In support of this argument, Plaintiff relies on *Rug Doctor, L.P. v. Prate*, 143 N.C. App. 343, 545 S.E.2d 766 (2001). In *Rug Doctor*, this Court analyzed a case concerning an alleged violation of a non-compete agreement. *Id.* at 344, 545 S.E.2d at 767. Although the plaintiff's claim for injunctive relief in *Rug Doctor* was rendered moot because the non-compete agreement had expired by the time of adjudication, we still allowed the plaintiff to proceed on his claim for money damages. *Id.* at 346, 545 S.E.2d at 768.

Regardless of *Rug Doctor*, we conclude Plaintiff's entire case is moot because he has now effectively obtained the relief sought. *See Ballard v. Weast*, 121 N.C. App. 391, 393, 465 S.E.2d 565, 567 (1996). Plaintiff initially brought suit for money damages to compensate him for alleged injury to his future career prospects and earning potential as a professional football player. Although any specific level of injury to Plaintiff's career prospects and earning potential is too "conjectural" and "hypothetical" to estimate, it is clear that the actions of UNC, Thorp, and the NCAA did not prevent Plaintiff from pursuing a professional football career. Like in *Messer*, Plaintiff's subsequent actions indicate he effectively obtained the relief he initially sought. Because Plaintiff now plays professional football in the NFL, we find his claims to be moot.

Therefore, we determine McAdoo has not raised any justiciable claims under the ASA.

**2. The Instrument**

Plaintiff does not challenge the procedures used during or the outcome arrived at in his UNC Honor Court proceedings. Instead, the focus of Plaintiff's claims against UNC and Thorp under the Instrument is his allegation that UNC failed to follow its own procedures, as outlined in the Instrument, by prematurely reporting his violations of NCAA regulations. Because Plaintiff has not alleged an injury in fact, we conclude his claims are non-justiciable since he does not have standing to raise a claim under the Instrument. *See Neuse River Foundation, Inc.*, 155 N.C. App. at 114, 574 S.E.2d at 51-52.

In North Carolina, individuals have full due process protection against the actions of state actors, such as public universities. *See State v. Strickland*, 169 N.C. App. 193, 195-96, 609 S.E.2d 253, 254-55 (2005). A state actor violates due process when it fails to follow its own rules and procedures. *See McLean v. Mecklenburg County*, 116 N.C. App. 431, 434-35, 448 S.E.2d 137, 139 (1994) (holding a county

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police civil service board violated officers' due process rights by failing to follow its own procedures in their termination proceedings).

Here, UNC is a state actor because it is a public university. *See Yan-Min Wang v. UNC-CH School of Medicine*, \_\_\_ N.C. App. \_\_\_, \_\_\_, 716 S.E.2d 646, 657 (2011) (analyzing a due process claim against UNC as a state actor). At UNC, all students are subject to the Instrument. The Instrument addresses the procedures for handling Honor Code violations and the rights of students accused of Honor Code violations. Specifically, it provides:

It shall be the responsibility of every student enrolled at the University of North Carolina to support the principles of academic integrity and to refrain from all forms of academic dishonesty including, but not limited to, the following:

1. Plagiarism in the form of deliberate or reckless representation of another's words, thoughts, or ideas as one's own without attribution in connection with submission of academic work, whether graded or otherwise.

. . . .

3. Unauthorized assistance or unauthorized collaboration in connection with academic work, whether graded or otherwise.

4. Cheating on examinations or other academic assignments, whether graded or otherwise, including but not limited to the following:

a. Using unauthorized materials and methods (notes, books, electronic information, telephonic or other forms of electronic communication, or other sources or methods), or

b. Representing another's work as one's own.

According to section IV(A) of the Instrument, accused students have, *inter alia*, "[t]he right to be presumed innocent until proven guilty," "[t]he right to a fair, impartial, and speedy hearing," and "[t]he right to have an alleged offence proven beyond a reasonable doubt[.]" We conclude Plaintiff fails to allege facts showing UNC did not follow the Instrument's provisions.

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Plaintiff contends UNC failed to comply with the Instrument when it reported his violation of NCAA bylaws before Plaintiff's Honor Court trial had occurred. Specifically, Plaintiff argues in his appellate brief that he was not afforded his rights, as guaranteed by section IV(A) of the Instrument:

(a) to be made aware of the charges against him and the possible sanctions; (b) to present a defense; (c) the presumption of innocence until proven guilty; (d) to a fair and impartial hearing; (e) to know the evidence and witnesses to be used against him and the right to confront these witnesses; and (f) to have an offense proven beyond a reasonable doubt.

However, Plaintiff does not raise a justiciable issue because he has not alleged an injury in fact. *See Neuse River Foundation, Inc.*, 155 N.C. App. at 114, 574 S.E.2d at 51–52. As denoted in section IV(A) of the Instrument, students' rights only attach to "violation[s] of the [UNC] Honor Code." Plaintiff does not argue UNC breached the Instrument in its handling of his Honor Code violations. Additionally, nothing in the Instrument addresses students' rights when accused of violating NCAA regulations. In fact, the ASA, an express contract between McAdoo and UNC, clearly established that the NCAA's requirements are distinct from UNC's requirements. For example, the UNC Honor Court did not involve itself with Plaintiff's receipt of benefits from a sports agent. Plaintiff, however, erroneously conflates UNC's requirements with the NCAA's requirements.

McAdoo argues that as a governmental agency, UNC is bound by due process requirements to follow the Instrument's procedures when meeting its NCAA obligations. We do not agree. While every citizen is guaranteed due process when a governmental institution is involved, here Plaintiff does not allege UNC or Thorp violated his due process rights when disciplining him for his Honor Code violation. UNC followed its own rules, as outlined in the Instrument, in handling McAdoo's Honor Court trial.

Furthermore, UNC also complied with NCAA regulations in reporting potential NCAA violations. In its petition to reinstate McAdoo's eligibility, UNC only referenced violations of NCAA bylaws. It specifically mentioned Bylaws 16.02.3, 16.11.2.1, and 12.3.1.2 (extra benefits) and 10.1-(b) (academic misconduct). In fact, UNC explicitly told the NCAA:



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[T]he facts surrounding the academic fraud have been submitted to the UNC Honor Court to be processed according to their policies for all students. Unfortunately, given the student-run nature of that system and the procedural steps that must be taken, it is unlikely that the case will be resolved until early November. . . . If we receive any additional information from the Honor Court prior to your determination, we will promptly provide it to you for consideration in this matter.

Under NCAA rules, UNC had a duty to report conduct which it concluded constituted a violation of NCAA regulations. These duties are independent of the Instrument's requirements. We agree that conduct prohibited by UNC and the NCAA may overlap, but the process required for violations of the Instrument is not required for compliance with an Institution's duties under the NCAA constitution and bylaws. Consequently, we conclude Plaintiff does not raise a justiciable issue against UNC and Thorp because he does not allege facts showing they violated his due process rights by failing to comply with the terms of the Instrument.

**B. The NCAA**

Plaintiff alleges (i) the NCAA violated its own rules by failing to stop the Hearing when a factual dispute arose; (ii) the NCAA acted arbitrarily by determining multiple violations of NCAA Bylaw 10.1-(b) occurred; and (iii) the NCAA acted arbitrarily by determining McAdoo "knowingly" violated NCAA Bylaw 10.1-(b). We conclude Plaintiff does not raise a justiciable issue under any of these theories.

In North Carolina, "[i]t is well established that courts will not interfere with the internal affairs of voluntary associations." *Wilson Realty & Constr., Inc. v. Asheboro-Randolph Bd. of Realtors, Inc.*, 134 N.C. App. 468, 470, 518 S.E.2d 28, 30 (1999) (citing 6 Am. Jur. 2d *Associations and Clubs* § 37 (1963)). "[W]here the duly adopted laws of a voluntary association provide for the final settlement of disputes among its members, by a procedure not shown to be inconsistent with due process, its action thereunder is final and conclusive and will not be reviewed by the courts in the absence of arbitrariness, fraud, or collusion." *Topp v. Big Rock Foundation, Inc.*, \_\_\_ N.C. App. \_\_\_, \_\_\_, 726 S.E.2d 884, 889 (quoting *Lough v. Varsity Bowl, Inc.*, 243 N.E.2d 61, 63 (Ohio 1968)) (quotation marks omitted) (alteration in original).

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Thus, under the *Topp* test, when a plaintiff challenges a voluntary organization's decision, the case will be dismissed as non-justiciable unless the plaintiff alleges facts showing (i) the decision was "inconsistent with due process," or (ii) the organization engaged in "arbitrariness, fraud, or collusion." *Id.*

Private voluntary organizations are not required to provide their members with the full substantive and procedural due process protections afforded under the United States and North Carolina constitutions. *See Gaston Bd. of Realtors, Inc. v. Harrison*, 64 N.C. App. 29, 36, 306 S.E.2d 809, 813–14 (1983) (Johnson, J., dissenting) ("[I]n the case of private associations, such an interpretation would give rise to serious constitutional questions regarding freedom of association under the First and Fourteenth Amendments to the United States Constitution."), *rev'd for reasons stated in dissent*, 311 N.C. 230, 316 S.E.2d 59 (1984); *NCAA v. Tarkanian*, 488 U.S. 179, 191 (1988) ("Embedded in our Fourteenth Amendment jurisprudence is a dichotomy between state action, which is subject to scrutiny under the Amendment's Due Process Clause, and private conduct, against which the Amendment affords no shield, no matter how unfair that conduct may be." (footnote omitted)(citation omitted)).

Rather, they must only (i) follow their own internal rules and procedures, and (ii) adhere to principles of "fundamental fairness" by providing notice and an opportunity to be heard. *See Gaston Bd. of Realtors, Inc.*, 311 N.C. at 237, 316 S.E.2d at 63 ("[T]he charter and bylaws of an association may constitute a contract between the organization and its members wherein members are deemed to have consented to all reasonable regulations and rules of the organization."); *Topp*, \_\_\_ N.C. App. at \_\_\_, 726 S.E.2d at 889 ("[A] voluntary association's decision may also be overturned if it did not afford the complaining party procedural due process (notice and an opportunity to be heard).").

Whether a voluntary organization's decision is arbitrary, fraudulent, or collusive is a question of law "equate[d] . . . with an abuse of discretion standard." *Id.* "Abuse of discretion results where the court's ruling is manifestly unsupported by reason or is so arbitrary that it could not have been the result of a reasoned decision." *State v. Hennis*, 323 N.C. 279, 285, 372 S.E.2d 523, 527 (1988); *see also White v. White*, 312 N.C. 770, 777, 324 S.E.2d 829, 833 (1985) ("A trial court may be reversed for abuse of discretion only upon a showing that its actions are manifestly unsupported by reason . . . [and] upon a show-

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ing that [the trial court's decision] was so arbitrary that it could not have been the result of a reasoned decision.”).

In the present case, however, we need not apply the *Topp* test to analyze the substance of Plaintiff's claims against the NCAA because, as discussed *supra*: (i) Plaintiff does not have standing to raise his claims; and (ii) his claims are now moot. Plaintiff lacks standing to bring claims against the NCAA because the alleged injury to his future football career is too speculative. *See Arendas*, \_\_\_ N.C. App. at \_\_\_, 718 S.E.2d at 200. Furthermore, his case against the NCAA is moot because he effectively obtained the relief sought when he signed a contract to play professional football with the Baltimore Ravens. *See Peoples*, 296 N.C. at 147, 250 S.E.2d at 912. Consequently, we determine the trial court did not err in dismissing his claims against the NCAA because his claims are non-justiciable.

**V. Conclusion**

We conclude from this review that McAdoo has not raised justiciable claims. First, McAdoo has not sustained any “injury in fact” because his scholarship was never terminated. Second, Plaintiff has accomplished the goal he sought to achieve—playing in the NFL. Finally, the remedies the plaintiff seeks, both in compensation and declaratory judgment, are hypothetical in nature. Consequently, we affirm the trial court's order dismissing Plaintiff's case.

**AFFIRMED.**

Judges ERVIN and McCULLOUGH concur.

## IN THE COURT OF APPEALS

## OVERTON v. EVANS LOGGING, INC.

[225 N.C. App. 74 (2013)]

WALTER T. OVERTON AND HATTIE OVERTON, PLAINTIFFS

v.

EVANS LOGGING, INC. F/K/A/, D/B/A, C.B. CARTER AND SONS, INC., EVANS  
LOGGING, AND INTERNATIONAL PAPER COMPANY, DEFENDANTS

No. COA12-761

Filed 15 January 2013

**1. Appeal and Error—interlocutory orders—dismissal of only one defendant—substantial risk of inconsistent verdicts**

An order in a negligence case arising from a logging site accident did not dispose of the entire case and was interlocutory where the claim against only one of the defendants was dismissed. However, there was a substantial risk of inconsistent verdicts from separate trials and the appeal was heard on the merits.

**2. Premises Liability—logging site—debris and logs—no clear path across site**

The trial court improperly granted defendant Evans Logging's N.C.G.S. § 1A-1, Rule 12(b)(6) motion to dismiss a negligence claim arising from an accident at a logging site. Plaintiffs' complaint clearly stated that the condition of the logging site consisted of scattered logs and debris strewn about the entire logging site, with no path free of logs and debris for crossing the site. Whether plaintiff Walter Overton should have recognized the danger and acted in a different manner was a question for the jury.

Appeal by Plaintiffs from Order entered 13 March 2012 by Judge Quentin T. Sumner in Bertie County Superior Court. Heard in the Court of Appeals 14 November 2012.

*Whitley Law Firm, by Robert E. Whitley, Jr. and Ann C. Ochsner, and Golkow Hessel, LLC, by Daniel L. Hessel, for Plaintiff-appellants.*

*Teague Campbell Dennis & Gorham, LLP, by Bryan T. Simpson and Megan B. Baldwin, for Defendant-appellee.*

HUNTER, JR., Robert N., Judge.

Walter Overton and Hattie Overton ("Plaintiffs") appeal from the trial court's order dismissing their complaint for failure to state a claim upon which relief may be granted. We reverse.

**OVERTON v. EVANS LOGGING, INC.**

[225 N.C. App. 74 (2013)]

**I. Factual & Procedural History**

Plaintiff Walter Overton worked for Mobley Construction Company as a logging truck driver. Defendant International Paper Company (“International Paper”) owned the timber rights to the trees at a logging site in Halifax County (“the logging site”). Defendant Evans Logging, Inc. (“Evans Logging”) contracted with International Paper to remove the timber from the logging site.

On or about 8 December 2008, as a part of his employment, Mr. Overton attempted to get a loading ticket from Evans Logging while at the logging site. The logging site had “scattered logs and debris strewn about” and there was “no path for walking or other means to crossing the logging site free of logs and debris.” In order to get his loading ticket from the Evans Logging employee who was issuing loading tickets, Mr. Overton was required to walk over the scattered logs and debris. While walking over the scattered logs and debris, Mr. Overton fell and sustained serious personal injuries.

Plaintiffs filed a complaint on 12 September 2011 against Evans Logging and International Paper alleging negligence and loss of consortium, and seeking punitive damages. On 13 October 2011, Defendant Evans Logging moved to dismiss the complaint pursuant to Rule 12(b)(6) of our Rules of Civil Procedure based on failure to state a claim upon which relief may be granted. In its motion, Defendant Evans Logging stated that any dangerous condition was open and obvious to Plaintiff Walter Overton and that there was therefore no duty by Evans Logging to protect or warn against any dangerous condition. Defendant International Paper filed its answer to the complaint on 17 January 2012, alleging, *inter alia*, contributory negligence by Plaintiff Walter Overton. On 27 February 2012, Evans Logging’s motion to dismiss was heard in Hertford County Superior Court, the Honorable Quentin T. Sumner presiding. On 13 March 2012, the trial court granted Evans Logging’s motion to dismiss with prejudice. Plaintiffs filed their notice of appeal on 26 March 2012.

**II. Jurisdiction**

[1] “Generally, there is no right of immediate appeal from interlocutory orders and judgments.” *Goldston v. Am. Motors Corp.*, 326 N.C. 723, 725, 392 S.E.2d 735, 736 (1990). “An interlocutory order is one made during the pendency of an action, which does not dispose of the case, but leaves it for further action by the trial court in order to settle and determine the entire controversy.” *Veazey v. City of Durham*, 231 N.C. 357, 362, 57 S.E.2d 377, 381 (1950). Because the claims

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against International Paper were not dismissed, the order in this case does not dispose of the entire case, and it is thus interlocutory.

Review for interlocutory appeals is available, however, from an order which affects a substantial right. N.C. Gen. Stat. § 7A-27(d)(1) (2011); *Sharpe v. Worland*, 351 N.C. 159, 162, 522 S.E.2d 577, 579 (1999). Where common factual issues overlap between the appealed claim and any remaining claims, a substantial right exists to avoid two trials on the same fact issues, as two trials may result in inconsistent verdicts. *Davidson v. Knauff Ins. Agency, Inc.*, 93 N.C. App. 20, 25, 376 S.E.2d 488, 491 (1989); *DeHaven v. Hoskins*, 95 N.C. App. 397, 399, 382 S.E.2d 856, 858 (1989).

In the present case, Plaintiffs have alleged negligence against both Evans Logging and International Paper in the same set of factual circumstances. Plaintiffs allege that both failed to maintain the logging site in a safe manner, failed to provide a safe alternative to the route Mr. Overton took or a safer process to deliver the documents, knew that requiring Mr. Overton to climb over the debris posed an unreasonable danger, and failed to exercise reasonable care in logging to prevent the condition the site was in. Plaintiffs additionally allege that International Paper breached its duty by failing to ensure Evans Logging performed its work properly and by hiring an incompetent subcontractor (Evans Logging).

Defendant Evans Logging contends that the claims against the two defendants are different and thus a substantial right is not affected. However, Plaintiffs have made many identical allegations against Evans Logging and International Paper. Plaintiffs allege negligence against both, and separate trials on the issue of negligence may result in inconsistent verdicts despite the fact pattern being the same. Because of the factual issues that overlap and the possibility of inconsistent verdicts, a substantial right exists to avoid two trials and we therefore proceed with consideration on the merits.

### **III. Analysis**

[2] Plaintiffs assert that the trial court improperly granted Defendant Evans Logging's motion to dismiss. We agree and reverse.

"The motion to dismiss under N.C. R. Civ. P. 12(b)(6) tests the legal sufficiency of the complaint. In ruling on the motion the allegations of the complaint must be viewed as admitted, and on that basis the court must determine as a matter of law whether the allegations state a claim for which relief may be granted." *Stanback v. Stanback*,

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297 N.C. 181, 185, 254 S.E.2d 611, 615 (1979) (citations omitted). “This Court must conduct a *de novo* review of the pleadings to determine their legal sufficiency and to determine whether the trial court’s ruling on the motion to dismiss was correct.” *Leary v. N.C. Forest Prods., Inc.*, 157 N.C. App. 396, 400, 580 S.E.2d 1, 4, *aff’d per curiam*, 357 N.C. 567, 597 S.E.2d 673 (2003).

In order to prove negligence in a premises liability case, the plaintiff must show either “(1) that the owner negligently created the condition causing the injury, or (2) that it negligently failed to correct the condition after notice, either express or implied, of its existence.” *Hinson v. Cato’s, Inc.*, 271 N.C. 738, 739, 157 S.E.2d 537, 538 (1967). Plaintiffs alleged both that Evans Logging caused the condition and that Evans Logging “knew or should have known” about the condition and did not correct the condition. Defendant Evans Logging, however, contends that because any alleged dangerous condition was open and obvious to Plaintiff Walter Overton, Plaintiffs failed to state a claim upon which relief may be granted.

There is ordinarily no duty to warn of an open and obvious condition. *S. Ry. Co. v. ADM Milling Co.*, 58 N.C. App. 667, 673, 294 S.E.2d 750, 755 (1982). However, “[w]hen a reasonable occupier of land should anticipate that a dangerous condition will likely cause physical harm to [a visitor], notwithstanding its known and obvious danger, the occupier of the land is not absolved from liability.” *Lorinovich v. K Mart Corp.*, 134 N.C. App. 158, 162, 516 S.E.2d 643, 646 (1999); *see also Martishius v. Carolco Studios, Inc.*, 142 N.C. App. 216, 223, 542 S.E.2d 303, 308 (2001) (“If a reasonable person would anticipate an unreasonable risk of harm to a visitor on his property, notwithstanding the lawful visitor’s knowledge of the danger or the obvious nature of the danger, the landowner has a duty to take precautions to protect the lawful visitor.”), *aff’d*, 355 N.C. 465, 562 S.E.2d 887 (2002).

In *Lorinovich*, the plaintiff was in the defendant’s grocery department and reached for a can of salsa which was six feet above the floor. 134 N.C. App. at 160, 516 S.E.2d at 645. This Court found that “assuming the salsa display presented an obviously dangerous condition, which itself is a question of fact, there is evidence that would support a conclusion that [the d]efendant should have anticipated that its customers could be injured from this type of display,” and thus summary judgment was improper. *Id.* at 163, 516 S.E.2d at 646-47.

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[225 N.C. App. 74 (2013)]

If the condition is such that it “cannot be negotiated with reasonable safety even though the [plaintiff] is fully aware of it,” it may be found that “obviousness, warning or even knowledge is not enough.” *S. Ry. Co.*, 58 N.C. App. at 673, 294 S.E.2d at 755 (quotation marks and citations omitted). In *Southern Railway*, the plaintiff’s employee was working on the defendant’s property when he slipped and fell on some feed from the defendant’s plant. *Id.* at 674, 294 S.E.2d at 755. Our Court found that the defendant knew that the employee had no choice but to encounter the obvious dangerous conditions and that “[w]hether [the] defendant’s failure to take additional precautions for the employee’s safety was reasonable under these circumstances was for the jury to determine.” *Id.* at 675-76, 294 S.E.2d at 756-57.

In the present case, Plaintiffs alleged that Defendant Evans Logging “[k]new or should have known through reasonable inspection or the exercise of reasonable care that requiring Plaintiff Walter Overton to climb over logs and other debris posed an unreasonable danger to Plaintiff Walter Overton and others on the logging site.” Taking the allegations of the complaint as admitted, Defendant Evans Logging should have anticipated a dangerous condition that would cause physical harm to its visitor and should have known that the conditions could not be negotiated with reasonable safety. *See Stanback*, 297 N.C. at 185, 254 S.E.2d at 615.

Defendant Evans Logging acknowledges that there is a duty where there is an unreasonable risk of harm or “it is to be expected that he will nevertheless proceed to encounter [the hazard].” *S. Ry. Co.*, 58 N.C. App. at 673, 294 S.E.2d at 755. However, Evans Logging argues that the case law only applies where a plaintiff has no other choice but to encounter the hazard and contends that Plaintiffs did not allege that there was no alternative path.

However, Plaintiffs’ complaint clearly states that “[t]he condition of the logging site consisted of scattered logs and debris strewn about the entire logging site, *leaving no path for walking or other means to crossing the logging site free of logs and debris.*” (Emphasis added.) Defendant Evans Logging is free to argue at trial that other paths were available to Plaintiff Walter Overton, but the complaint clearly alleges that there was no other path and that the conditions were such “as to require all persons to walk over scattered logs and debris.” Because Plaintiffs made sufficient allegations, the trial court was incorrect in dismissing the complaint for failure to state a claim, and we therefore reverse and remand to the trial court.



RUTHERFORD PLANTATION, LLC v. CHALLENGE GOLF GRP. OF THE CAROLINAS, LLC

[225 N.C. App. 79 (2013)]

We note that in cases where “the landowner retains a duty to the lawful visitor even though an obvious danger is present, the obvious nature of the danger is some evidence of contributory negligence on the part of the lawful visitor” that if found would bar recovery. *Lorinovich*, 134 N.C. App. at 162-63, 516 S.E.2d at 646. Contributory negligence is ordinarily a question for the jury. *Lamm v. Bissette Realty, Inc.*, 327 N.C. 412, 418, 395 S.E.2d 112, 116 (1990). Whether Plaintiff Walter Overton should have recognized the danger and acted in a different manner is a question of fact for the jury. *See Williams v. Walnut Creek Amphitheater P’ship*, 121 N.C. App. 649, 652, 468 S.E.2d 501, 504 (1996).

#### IV. Conclusion

For the foregoing reasons, the order of the trial court is

REVERSED AND REMANDED.

Judges HUNTER, Robert C. and CALABRIA concur.

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RUTHERFORD PLANTATION, LLC, PLAINTIFF

v.

THE CHALLENGE GOLF GROUP OF THE CAROLINAS, LLC F/K/A PREMIER  
BALSAM BUILDERS, LLC, DEFENDANTS

No. COA12-666

Filed 15 January 2013

#### **1. Appeal and Error—interlocutory orders—partial summary judgment—anti-deficiency statute—substantial right**

Although defendant’s appeal from the grant of partial summary judgment in favor of plaintiff was from an interlocutory order, the issue of whether the trial court violated North Carolina’s anti-deficiency statute by granting a monetary judgment on a purchase money note affected a substantial right, thus entitling defendant to immediate review.

#### **2. Civil Procedure—Rule 59—denial of motion to amend—partial summary judgment order**

The trial court abused its discretion in an action seeking recovery of the balance due on a promissory note plus attorney

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fees, or in the alternative an order for specific performance, by denying defendant's N.C.G.S. § 1A-1, Rule 59 motion to amend a partial summary judgment order. N.C.G.S. §45-21.38 prohibited a monetary judgment in this instance.

Judge STROUD dissenting.

Appeal by defendant from partial summary judgment order entered 4 November 2011 and from order denying defendant's motion to amend entered 29 November 2011 by Judge Marvin P. Pope, Jr. in Rutherford County Superior Court. Heard in the Court of Appeals 24 October 2012.

*David A. Lloyd for plaintiff.*

*McGuire, Wood & Bisette, P.A., by Douglas J. Tate for defendant.*

ELMORE, Judge.

The Challenge Golf Group of the Carolinas, LLC f/k/a Premier Balsam Builders, LLC (defendant) appeals the trial court's order granting partial summary judgment in favor of Rutherford Plantation, LLC (plaintiff) and the trial court's order denying its Rule 59 motion to amend. After careful consideration, we reverse the trial court's order denying defendant's Rule 59 motion to amend and remand for further proceedings consistent with this opinion.

### **Background**

On 17 May 2010, plaintiff, former owner and operator of Cleghorn Golf and Country Club (Cleghorn), negotiated an offer to purchase and contract (the contract) with defendant whereby plaintiff agreed to sell and defendant agreed to buy the property and personalty associated with Cleghorn for \$4,750,000.00. On 1 June 2010, plaintiff conveyed the property to defendant by a general warranty deed. Pursuant to the contract, defendant paid \$750,000.00 at closing and the parties executed a purchase money deed of trust in favor of plaintiff, as beneficiary, for the remaining \$4,000,000.00. In return, defendant agreed to pay plaintiff \$33,754.27 per month for 60 months. Thereafter, defendant was to make a balloon payment of \$3,040,363.94 on 1 June 2015 to satisfy the balance.

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Defendant defaulted on its obligation in April 2011, making no subsequent payments to plaintiff. Plaintiff provided defendant with a written notice of default and notice of acceleration of the debt. Defendant failed to cure. As a result of defendant's continued default, plaintiff initiated this action seeking recovery of the balance due on the promissory note plus attorneys' fees, or, in the alternative, an order for specific performance.

In its pleadings, defendant raised the affirmative defense of fraud as well as counterclaims for fraud, breach of contract, and unfair and deceptive trade practices. Defendant alleged that plaintiff fraudulently induced it to purchase Cleghorn by misrepresenting the financials for the business and by distorting the number of golf rounds played in previous years.

On 17 October 2011, plaintiff moved for summary judgment pursuant to Rule 56 on all claims. The trial court partially granted plaintiff's motion for summary judgment on 4 November 2011. In its order, the trial court entered a deficiency judgment against defendant for \$4,013,549.65, which represented the amount of plaintiff's claim as appearing in the pleadings, together with additional accrued interest through 31 October 2011. Pursuant to Rule 59, defendant moved to amend the partial summary judgment order. Defendant's motion was denied and it now appeals.

#### **A. Rule 59 Motion to Amend**

In the case *sub judice*, we need only to address defendant's second issue on appeal. Defendant argues that the trial court erred in denying its motion to amend the partial summary judgment order. We agree.

[1] We note initially that defendant has appealed from an interlocutory order. Interlocutory orders are, however, subject to appellate review when the order deprives the appellant of a substantial right that would be lost unless immediately reviewed. *See Waters v. Qualified Personnel, Inc.*, 294 N.C. 200, 207, 240 S.E.2d 338, 343 (1978). Moreover, the deprivation of that substantial right must potentially work injury . . . if not corrected before appeal from final judgment." *Goldston v. Am. Motors Corp.*, 326 N.C. 723, 726, 392 S.E.2d 735, 736 (1990).

N.C. Gen. Stat. § 1-278 provides that "upon an appeal from a judgment, the court may review any intermediate order involving the merits and necessarily affecting the judgment." In *Paynter v. Maggiolo*,

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we held that an order granting summary judgment on issue of whether North Carolina's anti-deficiency statute prohibited the holder of a second purchase money deed of trust from bringing an *in personam* action affected a substantial right and was immediately appealable. 105 N.C. App. 312, 313-314, 412 S.E.2d 691, 693 (1992). Here, the issue is whether the trial court violated North Carolina's anti-deficiency statute by granting a monetary judgment on a purchase money note. Such issue on appeal necessarily affects the judgment. Therefore, we conclude that a substantial right is affected, and we will consider the substance of this appeal.

This Court's "review of a trial judge's discretionary ruling . . . is strictly limited to the determination of whether the record affirmatively demonstrates a manifest abuse of discretion by the judge." *Beneficial Mortg. Co. v. Peterson*, 163 N.C. App. 73, 84, 592 S.E.2d 724, 731 (2004) (quoting *Worthington v. Bynum*, 305 N.C. 478, 482, 290 S.E.2d 599, 602 (1982) (citations and quotations omitted).

**[2]** Defendant specifically argues that the partial summary judgment order is contrary to law pursuant to N.C. Gen. Stat. § 45-21.38. According to the statute:

[T]he mortgagee or trustee or holder of the notes secured by such mortgage or deed of trust shall not be entitled to a deficiency judgment on account of such mortgage, deed of trust or obligation secured by the same: Provided, said evidence of indebtedness shows upon the face that it is for balance of purchase money for real estate: Provided, further, that when said note or notes are prepared under the direction and supervision of the seller or sellers, he, it, or they shall cause a provision to be inserted in said note disclosing that it is for purchase money of real estate; in default of which the seller or sellers shall be liable to purchaser for any loss which he might sustain by reason of the failure to insert said provisions as herein set out.

N.C. Gen. Stat. §45-21.38 (2012).

Thus, N.C. Gen. Stat. §45-21.38 specifies that the foreclosing party is not entitled to a deficiency judgment if the underlying transaction is a purchase money transaction. In the case *sub judice*, plaintiff drafted the contract, the purchase money promissory note, and the purchase money deed of trust. The contract specifically provided that the purchase money promissory note was secured by a "purchase

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money deed of trust which shall be first lien on the Property.” As such, both parties had sufficient notice that the contract was to be construed as a purchase money transaction.

First, we note that defendant’s failure to argue N.C. Gen. Stat. §45-21.38 at the summary judgment hearing does not preclude it from arguing the statute on appeal. The trial court is expected to take judicial notice of public statutes. *See Moyle v. Hopkins*, 222 N.C. 33, 34, 21 S.E.2d 826, 827 (1942). Second, we recognize that defendant made a scrivener’s error in its motion to amend, stating that the motion was brought pursuant to Rule 59(a)(8) instead of Rule 59(a)(7). However, such error is not fatal provided the substantive grounds and relief desired are apparent and the nonmovant is not prejudiced thereby. *See Garrison v. Garrison*, 87 N.C. App. 591, 361 S.E.2d 921 (1987). In its motion to amend, defendant argued that the trial court made an “error of law” in entering the monetary judgment in favor of plaintiff as N.C. Gen. Stat. §45-21.38 states that a mortgagee is not entitled to a monetary judgment when the executed deed of trust is to secure payment of the balance of the purchase price of real property. We conclude that the substantive grounds for relief were apparent and defendant brought its motion pursuant to Rule 59(a)(7). *See* N.C. Gen. Stat. § 1A-1, Rule 59.

We agree with defendant in that the entry of a deficiency judgment in favor of plaintiff was improper as N.C. Gen. Stat. §45-21.38 prohibits a monetary judgment in this instance.

### **B. Abuse of Discretion**

We must next consider whether the trial court’s denial of defendant’s Rule 59 motion to amend constituted an abuse of discretion. We believe it did.

“Abuse of discretion results where the court’s ruling is manifestly unsupported by reason or is so arbitrary that it could not have been the result of a reasoned decision.” *State v. Hennis*, 323 N.C. 279, 285, 372 S.E.2d 523, 527 (1988) (citation omitted).

This court has concluded that

the benefits of [N.C. Gen. Stat. §45-21.38] *cannot be waived*. As interpreted by our Supreme Court in *Ross Realty*, it effects the broad public purpose of abolishing deficiency judgments in purchase money transactions if foreclosure on the security yields an insufficient fund to

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satisfy the indebtedness secured. The protection [N.C. Gen. Stat. §45-21.38] offers is afforded to all purchasers of realty who secure any party of the purchase price with a deed of trust on the realty they are purchasing.

*Chemical Bank v. Belk*, 41 N.C. App. 356, 365, 255 S.E.2d 421, 427, cert. denied, 298 N.C. 293, 259 S.E.2d 911 (1979) (citing (emphasis added); *See also Ross Realty Co. v. First Citizens Bank & Trust Co.*, 296 N.C. 366, 250 S.E.2d 271 (1979). By providing that the statute cannot be waived, the legislature emphasized the importance of protecting buyers in purchase money transactions. In the case at hand, the parties did not attempt to waive N.C. Gen. Stat. § 45-21.38. However, assuming *arguendo* that they had intended such, the “waiver would defeat the legislative purpose of N.C. Gen. Stats. § 45-21.38 and would attempt, by private action of parties, to confer upon the courts that jurisdiction over the question that was expressly taken away by the enactment of the statute.” *Id.* at 366, 255 S.E.2d at 428.

As such, we are persuaded that the partial summary judgment order is contrary to N.C. Gen. Stat. § 45-21.38. Accordingly, the trial court abused its discretion by denying defendant’s motion to amend.

### **Conclusion**

In sum, the trial court erred in entering a deficiency judgment against defendant. Thus, the trial court’s denial of defendant’s Rule 59 motion to amend constituted an abuse of discretion. After careful consideration, we reverse the trial court’s order and remand for further proceedings consistent with this opinion.

Reversed and remanded.

Judge BEASLEY concurred prior to 18 December 2012.

Judge STROUD dissents by separate opinion.

STROUD, Judge, dissenting.

Because I believe that this Court has no authority to review defendant’s argument based upon defendant’s failure to file a timely appeal to the trial court’s partial summary judgment order, I respectfully dissent.

I will not repeat the procedural history as provided by the majority opinion but would add some pertinent dates. The trial court’s par-

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tial summary judgment order was entered on 4 November 2011, and defendant filed its motion to amend the order granting partial summary judgment, pursuant to N.C. Gen. Stat. § 1A-1, Rule 59(a)(8), on 14 November 2011. The trial court entered its order denying the motion to amend the partial summary judgment order on 28 November 2011. Defendant filed notice of appeal to both orders on 19 December 2011.

I. Appeal from 4 November 2011 partial summary judgment order

I would first note that defendant's appeal of the partial summary judgment order, entered on 4 November 2011, was not filed within 30 days of entry of the order, so it is not timely and must be dismissed. Defendant's motion for amendment of the order was made pursuant to N.C. Gen. Stat. § 1A-1, Rule 59. The motion itself cites Rule 59(a)(8) specifically, although defendant argues on appeal that, "At the hearing Challenge Golf argued that the summary judgment order should have been amended under Rule 59(a)(7) and (a)(9) of the North Carolina Rules of Civil Procedure."<sup>1</sup> These subsections of Rule 59 provide as follows:

(a) Grounds.—A new trial may be granted to all or any of the parties and on all or part of the issues for any of the following causes or grounds:

. . . .

(7) Insufficiency of the evidence to justify the verdict or that the verdict is contrary to law;

(8) Error in law occurring at the trial and objected to by the party making the motion, or

(9) Any other reason heretofore recognized as grounds for new trial.

N.C. Gen. Stat. § 1A-1, Rule 59.

A motion for new trial under Rule 59 will toll the time for notice of appeal if the motion is properly a Rule 59 motion; the title of the motion is, however, not controlling. *See Smith v. Johnson*, 125 N.C. App. 603, 606, 481 S.E.2d 415, 417 ("The mere recitation of the rule

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1. Defendant also refers to its motion as a Rule 59(e) motion. Rule 59(e) does not provide any substantive grounds for relief; it merely provides that "A motion to alter or amend the judgment under section (a) of this rule shall be served not later than 10 days after entry of the judgment." Defendant's motion was filed within 10 days of the partial summary judgment order.

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number relied upon by the movant is not a statement of the grounds within the meaning of Rule 7(b)(1). The motion, to satisfy the requirements of Rule 7(b)(1), must supply information revealing the basis of the motion.” (citations omitted)), *disc. rev. denied*, 346 N.C. 283, 487 S.E.2d 554 (1997). Defendant’s motion to amend judgment was not a proper Rule 59 motion, but instead was an attempt to reargue the summary judgment motion, raising a new legal issue which it had not previously raised.

A Rule 59 motion is properly filed after a trial by jury or a bench trial. *See Garrison ex rel. Chavis v. Barnes*, 117 N.C. App. 206, 211, 450 S.E.2d 554, 557 (1994) (citing W. Brian Howell, *Shuford North Carolina Civil Practice & Procedure* § 59, at 625 (4th ed. 1992) for the proposition that “Rule 59 provides relief from judgments in jury or nonjury trials resulting from errors occurring during trial.”). Rule 59(a)(7) is simply not applicable to this case, as the challenge was to a summary judgment order; sufficiency of the evidence is not a consideration in this situation and there was no “verdict.” The majority opinion treats defendant’s reference to Rule 59(a)(8) in its motion as a “scrivener’s error,” accepting defendant’s reply brief argument that defendant instead meant Rule 59(a)(7). Defendant repeatedly refers to the trial court’s partial summary judgment order as a “verdict,” but calling it a verdict does not make it one. A summary judgment order is not a “verdict.” Calling it a verdict “is an infelicitous and inaccurate choice of words, for the word ‘verdict’ means the answer of the jury concerning any matter of fact submitted to them for trial.” *State v. Jernigan*, 255 N.C. 732, 736, 122 S.E.2d 711, 714 (1961) (citations omitted). Rule 59(a)(7) is not applicable to the trial court’s order granting partial summary judgment. As the majority relies upon Rule 59(a)(7) for its analysis, I cannot join in its opinion.

Defendant’s only argument as to the anti-deficiency statute is that the trial court made an error of law, which would fit best under Rule 59(a)(8). But again, there was no “trial,” only a hearing on a motion for summary judgment, and defendant did not raise the anti-deficiency statute defense at that hearing, so Rule 59(a)(8) is not applicable. Defendant acknowledges that “Challenge Golf did not argue N.C. Gen. Stat. §45-21.38 or *Barnaby v. Boardman* at the summary judgment hearing,” but asks that this Court take “judicial notice of ‘matters appearing upon public statutes,’ ” specifically N.C. Gen. Stat. § 45-21.38. Rule 59(a)(8) specifically addresses “error of law” but still requires that the party who challenges the trial court’s ruling must have “objected,” or raised the issue before the trial court. The fact that a



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court can take judicial notice of a statute does not provide an alternate method for raising new legal arguments after a hearing is over.

Both a motion and an order for new trial filed under Rule 59(a)(8) have two basic requirements. First, the errors to which the trial judge refers must be specifically stated. Second, the moving party must have objected to the error which is assigned as the basis for the new trial. N.C.Gen. Stat. 1A-1, Rule 59(a)(8).

*Barnett v. Security Ins. Co. of Hartford*, 84 N.C. App. 376, 380, 352 S.E.2d 855, 858 (1987) (citation omitted). Defendant clearly failed to do this, and its argument asks us to consider Rule 59(a)(8)'s requirement of "objection" to the ruling during the "trial" as unnecessary. Defendant's argument simply does not fit within the plain language of the rule.

Defendant then argues that the trial court should have exercised its broad powers under the "catch-all" of Rule 59(a)(9), contending that this "provision [ ] recognizes the discretionary power of the court to order a new trial when justice would be served and gives the court broad discretion to amend a judgment. *See Sizemore v. Raxter*, 58 N.C. App. 236, 236-237, 293 S.E.2d 294(1982)".

Even if I ignore the fact that there has been no "trial" in this case, and that all of the cases cited by Defendant address motions filed after a full trial, even the cases cited by defendant fail to show that our courts have ever recognized a legal error such as defendant argues here as grounds for a new trial under Rule 59(a)(9). In fact, the case upon which *Sizemore* relies makes it clear that this subsection excludes "legal error:"

"Whether a verdict should be set aside, *otherwise than for error of law*, rests in the sound discretion of the trial judge. Here the trial judge, 'being of the opinion that justice and equity' required that he do so, exercised such discretion and set the verdict aside. The record discloses no abuse of discretion; hence, the order is not subject to review on appeal.

*Walston v. Greene*, 246 N.C. 617, 617, 99 S.E.2d 805, 805-06 (1957) (emphasis added) (cited by *Sizemore*, 58 N.C. App. at 237, 293 S.E.2d at 294).

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Defendant argues specifically that “[t]he partial summary judgment should have been amended because the trial court made an *error of law*, and correcting that error would serve the ends of justice.” As defendant presents solely an error of law, the trial court’s ruling was not subject to challenge under Rule 59(a)(9); the trial court’s ruling was subject to challenge only by appeal.

Essentially, a motion under any of the subsections of Rule 59 argued by defendant is proper only after a trial and not after a summary judgment hearing. This Court addressed a similar situation in *Bodie Island Beach Club Ass’n, Inc. v. Wray*:

On 6 August 2010, SRS filed a Motion to Set Aside Default and Summary Judgment pursuant to Rule 55(d), 59(a)(8) and (9), and 60(b) of the North Carolina Rules of Civil Procedure. SRS argues that the Rule 59 Motion to Set Aside Default and Summary Judgment tolled the appeal from 6 August 2010, filed within ten days of the 30 July 2010 order, making its appeal timely. We disagree. Because both Rule 59(a)(8) and (9) are properly made after a trial, and the case *sub judice* concluded at the summary judgment stage, SRS’ 6 August 2010 motion did not toll the appeal, permitting us to dismiss the appeal as to the 30 July 2010 Order and the 24 September 2010 Order.

*Bodie Island Beach Club Ass’n, Inc. v. Wray*, \_\_\_ N.C. App. \_\_\_, \_\_\_, 716 S.E.2d 67, 72 (2011).

Similarly, the Motion to Amend Judgment here did not toll the time for appeal of the order granting partial summary judgment because it was not a proper Rule 59 motion, but instead was an attempt to present a new legal issue to the trial court which was not raised in defendant’s answer or at the summary judgment hearing. As time for appeal was not tolled and defendant’s notice of appeal was not filed within 30 days of entry of the order, I would dismiss defendant’s appeal from the partial summary judgment order.

## II. Appeal from order denying motion to amend judgment

Defendant’s appeal from the order denying its motion to amend the partial summary judgment order was filed within 30 days of entry of the order and thus was timely. Yet I believe that any further consideration of defendant’s argument of legal error is foreclosed by its

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improper attempt to use a Rule 59 motion as a substitute for an appeal. This situation was addressed by our Court in *Smith v. Johnson*:

Defendants have timely appealed from the denial of their motion [based upon Rule 59(a)(2) & (7) and Rule 59(e).] Having determined, however, that the motion is merely a request that the trial court reconsider its earlier decision and having determined that it does not qualify as a Rule 59(e) motion, and because there are no other provisions for motions for reconsideration, the motion was properly denied.

*Smith*, 125 N.C. App. at 607, 481 S.E.2d at 417.

Because defendant's appeal from the partial summary judgment order was not timely and should be dismissed, this Court cannot consider defendant's arguments regarding other reasons that the trial court should not have granted summary judgment, such as questions of material fact as to certain defenses. I note that the majority also avoided discussion of these issues, instead focusing upon the one issue which could arguably still be subject to review, the inability to waive the protections of the anti-deficiency statute. But since there is no argument for reconsideration of the trial court's ruling other than that based upon the anti-deficiency statute, which was improperly and belatedly raised by defendant in its motion to amend judgment, I believe we must affirm the trial court's ruling upon the defendant's motion to amend as well.

Although I recognize that *Barnaby v. Boardman*, 313 N.C. 565, 330 S.E.2d 600 (1985), *Chemical Bank v. Belk*, 41 N.C. App. 356, 255 S.E.2d 421 (1979), and *Ross Realty v. First Citizens Bank and Trust Co.*, 296 N.C. 366, 250 S.E.2d 271 (1979), do hold that a purchaser cannot waive the protections of the anti-deficiency statute, none of those cases presented a situation in which the purchaser failed to present the defense before the trial court. In those cases, the argument was that for various reasons, the purchasers had foregone the protections of N.C. Gen. Stat. § 45-21.38 in the underlying transaction. See *Barnaby*, 313 N.C. at 567, 330 S.E.2d at 601-02; *Chemical Bank*, 41 N.C. App. at 364, 255 S.E.2d at 426; *Ross Realty*, 296 N.C. at 367, 250 S.E.2d at 272.

I do not think the fact that the purchaser cannot waive this defense at the front end of the deal eliminates the provisions of the Rules of Civil Procedure and all of the case law establishing what a

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court may or may not consider under Rule 59 when the deal goes bad and ends up in litigation. I believe that reversing the trial court's order of partial summary judgment for the reasons as stated by the majority is inconsistent with the plain language of our Rules of Civil Procedure. I therefore respectfully dissent. I would dismiss defendant's appeal as to the order granting partial summary judgment and affirm the trial court's order denying defendant's motion to amend its judgment.

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LASHANDA SHAW, PLAINTIFF

v.

THE GOODYEAR TIRE &amp; RUBBER CO., DEFENDANTS

No. COA12-338

Filed 15 January 2013

**Jurisdiction—subject matter—negligent infliction of emotional distress—Workers' Compensation Act—exclusivity provisions**

The trial court lacked subject matter jurisdiction over plaintiff's negligent infliction of emotional distress claim caused by defendant's willful or wanton negligence because the exclusivity provision of the Workers' Compensation Act gives the Industrial Commission exclusive jurisdiction over this type of claim. Plaintiff's claim fell within the purview of the Worker's Compensation Act but was not enough to sustain a *Woodson* claim and thereby qualify as an exception to the exclusivity provisions of the Workers' Compensation Act.

Appeal by defendant from judgment entered 8 April 2011 by Judge Mary Ann Tally in Superior Court, Cumberland County. Heard in the Court of Appeals 29 November 2012.

*Kennedy, Kennedy, Kennedy and Kennedy, LLP, by Harold L. Kennedy, III and Harvey L. Kennedy, for plaintiff-appellee.*

*Brooks, Pierce, McLendon, Humphrey & Leonard, L.L.P., by Julia C. Ambrose, John W. Ormand, III and Patricia W. Goodson, for defendant-appellant.*

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*Womble Carlyle Sandridge & Rice, LLP, by Burley B. Mitchell, Jr., for Amicus Curiae North Carolina Chamber.*

STROUD, Judge.

This case presents in a unique procedural posture, with defendant's appeal from a \$450,000.00 jury award to plaintiff for her claim of negligent infliction of emotional distress, arguing, *inter alia*, that the trial court lacked subject matter jurisdiction. For the following reasons, we agree and vacate the judgment of the trial court.

### I. Background

This case is in an unusual procedural posture because it comes to us with facts that have already been determined by a jury. Because the only issue addressed by this Court is subject matter jurisdiction, we recite just the background we deem pertinent for an understanding of the jurisdictional issue before us. In 2007, defendant hired plaintiff "as an Area Manager." During the course of plaintiff's employment, she complained that she was being harassed by her male supervisor. Plaintiff's supervisor's behavior toward plaintiff was obnoxious and rude; the harassment was verbal and involved some forms of intimidation but did not involve anything of a sexual nature nor did it involve any physical contact with plaintiff. Despite plaintiff's complaints to the appropriate personnel, plaintiff's supervisor remained in his position, where he continued to harass her, and eventually, defendant terminated plaintiff's employment. On 13 January 2010, plaintiff filed a verified amended complaint claiming (1) wrongful discharge, (2) violation of Retaliatory Employment Discrimination Act ("REDA"), (3) tortious interference with contractual rights, (4) intentional infliction of emotional distress, and (5) negligent infliction of emotional distress ("NIED").<sup>1</sup>

On or about 27 August 2010, plaintiff voluntarily dismissed her second claim, the REDA claim. On 8 November 2010, defendant filed a motion for summary judgment. On 21 December 2010, the trial court filed an order regarding defendant's motion for summary judgment and dismissed plaintiff's third and fourth claims for tortious interference with contractual rights and intentional infliction of emotional

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1. Plaintiff's verified amended complaint also included Mr. Doug Swain, her former supervisor, as a defendant. Furthermore, on 7 October 2010, plaintiff filed a motion to amend her complaint to add a claim for assault. On 15 November 2010, the trial court dismissed Mr. Swain from this lawsuit and denied plaintiff's motion to amend her complaint. Plaintiff has not appealed the 15 November 2010 order.

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distress. Accordingly, only plaintiff's first and fifth claims for wrongful discharge and NIED remained at the time of trial. The allegations central to both plaintiff's wrongful discharge and NIED claims were that plaintiff complained to defendant about the harassment by her supervisor; defendant negligently handled plaintiff's complaint about the harassment; and defendant's negligence caused plaintiff's emotional distress and eventually led to her wrongful discharge.

Several specific issues were submitted to the jury, and on appeal neither party challenges these issues as submitted to the jury. After a lengthy trial, the jury entered the following verdict:

**ISSUE ONE:**

Did the defendant intentionally discriminate against the plaintiff because of her race or sex or both when the defendant fired the plaintiff?

[The jury answered "No[.]"]

**ISSUE TWO:**

Did the defendant retaliate against the plaintiff by firing her for her making a complaint of discrimination based upon her race or sex or both?

[The jury answered "Yes[.]"]

**ISSUE THREE:**

Would the defendant have terminated the plaintiff in the absence of race or sex discrimination and/or retaliation for her complaints of discrimination?

YOU WILL ANSWER THIS ISSUE ONLY IF YOU HAVE ANSWERED ISSUES 1 OR 2 "YES["] IN FAVOR OF THE PLAINTIFF.

[The jury answered "Yes[.]"]

**ISSUE FOUR:**

Did the plaintiff suffer severe emotional distress as a proximate result of the negligence of the defendant?

[The jury answered "Yes[.]"]

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**ISSUE FIVE:**

What amount of damages is the plaintiff entitled to recover?

YOU ARE TO ANSWER THIS ISSUE ONLY IF YOU HAVE ANSWERED ISSUES 1 OR 2 “YES” IN FAVOR OF PLAINTIFF AND ANSWERED ISSUE 3 “NO” OR IF YOU HAVE ANSWERED ISSUE 4 IN FAVOR OF THE PLAINTIFF.

[The jury answered “\$450,000.00[.]”]

The jury verdict sheet required that the jury answer Issue Five only in either of two scenarios: (1) “IF [IT HAD] ANSWERED ISSUES 1 OR 2 ‘YES’ IN FAVOR OF PLAINTIFF AND ANSWERED ISSUE 3 ‘NO’ ” or (2) “IF [IT HAD] ANSWERED ISSUE 4 IN FAVOR OF THE PLAINTIFF.” The jury answered Issue Two “Yes[.]” but answered Issue Three “No[.]” Accordingly, the jury could not award plaintiff a verdict based upon the first two issues.<sup>2</sup> The jury answered Issue Four “Yes[.]” and thus the award of \$450,000.00 was based solely upon Issue Four regarding plaintiff’s “severe emotional distress as a proximate result of the negligence of defendant.” In summary, the jury did not award plaintiff any damages for her wrongful discharge claim but only for her NIED claim.

The jury then considered the issue of punitive damages. The jury entered the following verdict as to punitive damages:

**ISSUE ONE:**

IS THE DFENDANT LIABLE TO THE PLAINTIFF FOR PUNITIVE DAMAGES FOR NEGLIGENT INFLECTION OF SEVERE EMOTIONAL DISTRESS?

[The jury answered “Yes[.]”]

**ISSUE TWO:**

WHAT AMOUNT OF PUNITIVE DAMAGES, IF ANY, DOES THE JURY IN ITS DISCRETION AWARD TO THE PLAINTIFF?

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2. At this point, the verdict was essentially a dogfall. “This colloquialism is derived from wrestling where it signifies a draw or tie.” *Raybon v. Reimers*, 226 S.E.2d 620, 621 n.1, (Ga. Ct. App. 1976).

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(YOU ARE TO ANSWER THIS ISSUE ONLY IF YOU  
HAVE ANSWERED THE FIRST “YES” IN FAVOR OF  
THE PLAINTIFF)

[The jury answered “None[.]”]

On 8 April 2011, the trial court entered judgment consistent with the jury’s verdict sheets and awarded plaintiff compensatory damages of \$450,000.00. Defendant appeals.

## II. Jurisdiction

Defendant argues that “the trial court lacked subject matter jurisdiction over plaintiff’s NIED claim, which is barred by the exclusivity provision of the Workers’ Compensation Act.” (Original in all caps.) “Whether a trial court has subject-matter jurisdiction is a question of law, reviewed de novo on appeal.” *McKoy v. McKoy*, 202 N.C. App. 509, 511, 689 S.E.2d 590, 592 (2010). It is important to note that the only issue on appeal is the trial court’s jurisdiction as to plaintiff’s NIED claim, and thus we need not consider any of plaintiff’s other claims. Furthermore, the relevant facts have already been determined by the jury, so our analysis is based upon the jury’s verdict and not the allegations or evidence of either party.

Here, the jury determined that “plaintiff suffer[ed] severe emotional distress as a proximate result of the negligence of the defendant” and awarded plaintiff \$450,000.00 as compensation for that claim and that claim only. The jury further determined that defendant is “liable to the plaintiff for punitive damages for negligent infliction of severe emotional distress” but awarded no damages. (Original in all caps.) However, a finding of liability for punitive damages requires that the plaintiff prove “that the defendant is liable for compensatory damages and that one of the following aggravating factors was present and was related to the injury for which compensatory damages were awarded: (1) Fraud. (2) Malice. (3) Willful or wanton conduct.” N.C. Gen. Stat. § 1D-15(a) (2007). The jury was properly instructed on the requirements for a finding of liability for punitive damages as to willful or wanton conduct. Plaintiff proved “that the defendant [was] liable for compensatory damages” as is shown by the jury’s compensatory damages award of \$450,000.00. Accordingly, the issue before us is whether the trial court had jurisdiction over plaintiff’s claim for NEID caused by defendant’s willful or wanton negligence.<sup>3</sup>

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3. We note that plaintiff’s claim for NIED against defendant was based upon defendant’s mishandling of her complaints about harassment by her supervisor; in



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**A. Willful and/or Wanton Negligence Defined**

Here, the jury has already made the determination that defendant's negligence was "willful or wanton." "Willful negligence arises from the tortfeasor's deliberate breach of a legal duty owed to another, while wanton negligence is done of a wicked purpose or done needlessly, manifesting a reckless indifference to the rights of others." *Sloan v. Miller Building Corp.*, 128 N.C. App. 37, 43, 493 S.E.2d 460, 464 (1997) (citation, quotation marks, and ellipses omitted). "Wil[l]ful and wanton negligence is conduct which shows either a deliberate intention to harm, or an utter indifference to, or conscious disregard for, the rights or safety of others. Carelessness and recklessness, though more than ordinary negligence, is less than willful[l]ness or wantonness." *Siders v. Gibbs*, 31 N.C. App. 481, 485, 229 S.E.2d 811, 814 (1976) (citation and quotation marks omitted). Here, defendant argues that the trial court did not have jurisdiction over plaintiff's NIED claim caused by defendant's willful and wanton negligence because the Industrial Commission has exclusive jurisdiction over this type of claim.

**B. The Exclusivity Provisions**

N.C. Gen. Stat. § 97-9 provides,

Every employer subject to the compensation provisions of this Article shall secure the payment of compensation to his employees in the manner hereinafter provided; and while such security remains in force, he or those conducting his business shall only be liable to any employee for personal injury or death by accident to the extent and in the manner herein specified.

N.C. Gen. Stat. § 97-9 (2007).

N.C. Gen. Stat. § 97-10.1, provides,

If the employee and the employer are subject to and have complied with the provisions of this Article, then the rights and remedies herein granted to the employee, his dependents, next of kin, or personal representative

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other words, the cause of defendant's liability was not plaintiff's supervisor's harassment *per se*, but the fact that defendant mishandled plaintiff's complaints about her supervisor's harassment. Accordingly, cases in which claims are premised upon the actual harassment, be it sexual, physical or verbal, are of limited use in this case, as the determinative facts in this case do not concern harassment but instead the mishandling of harassment complaints.

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shall exclude all other rights and remedies of the employee, his dependents, next of kin, or representative as against the employer at common law or otherwise on account of such injury or death.

N.C. Gen. Stat. § 97-10.1 (2007).

Thus, this Court and our Supreme Court have agreed that

[t]he [Workers' Compensation] Act provides that its remedies are the only remedies an employee has against his or her employer for claims covered by the Act. . . . *Even where the complaint alleges willful and wanton negligence and prays for punitive damages, the remedies under the Act are exclusive.* An employee cannot elect to pursue an alternate avenue of recovery, but is required to proceed under the Act with respect to compensable injuries.

*McAllister v. Cone Mills Corp.*, 88 N.C. App. 577, 580, 364 S.E.2d 186, 188 (1988) (emphasis added) (citations omitted); see *Freeman v. SCM Corporation*, 311 N.C. 294, 295-96, 316 S.E.2d 81, 82 (1984) (The "plaintiff filed this action, alleging that her injuries were caused by the gross, willful and wanton negligence and by the intentional acts of defendant. . . . Since plaintiff was here covered by and subject to the provisions of the Workers' Compensation Act, her rights and remedies against defendant employer were determined by the Act and she was required to pursue them in the North Carolina Industrial Commission. She could not, in lieu of this avenue of recovery, institute a common law action against her employer in the civil courts of this State." (citation omitted)). Thus, the only ways in which plaintiff might avoid the exclusive jurisdiction of the Industrial Commission are (1) that her claim falls under an exception to the exclusivity provisions or (2) that her NIED claim was not "covered by the Act." *McAllister*, 88 N.C. App. at 580, 364 S.E.2d at 188. We consider both of these alternatives in turn.

*C. Woodson v. Rowland*

In 1991, our Supreme Court recognized one exception to the exclusivity provisions with the seminal case of *Woodson v. Rowland*, 329 N.C. 330, 407 S.E.2d 222 (1991). In *Woodson*, Mr. Thomas Sprouse was working in a trench "to lay sewer lines." 329 N.C. at 334, 407 S.E.2d at 225. The trench should have had a trench box, but did not in violation of the Occupational Safety and Health Act of North

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Carolina. *Id.* at 335, 407 S.E.2d at 225. One foreman did not allow his men to work in the trench because of the dangers posed by the trench without a trench box. *Id.* Though a trench box was available on site, Mr. Sprouse's project supervisor, among others, decided not to use it; the trench collapsed and Mr. Sprouse was buried alive. *Id.* at 335-36, 407 S.E.2d at 225. Mr. Sprouse died as a result of the trench collapse and plaintiff, the administrator of Mr. Sprouse's estate, sued at the trial court but also

filed a Workers' Compensation claim to meet the filing deadline for compensation claims. In order to avoid a judicial ruling that she had elected a workers' compensation remedy inconsistent with the civil remedies she presently seeks, plaintiff specifically requested that the Industrial Commission not hear her case until completion of th[e] action [before the trial court]. The Commission . . . complied with her request[.]

*Id.* at 336, 407 S.E.2d at 226. The defendant requested summary judgment and prevailed at both the trial level and before this Court. *Id.* Upon further appeal, the question pending before the Supreme Court was "whether the exclusivity provisions of the Workers' Compensation Act limit[ed] plaintiff's remedies to those provided by the Act." *Id.* at 334, 407 S.E.2d at 224.

The Court then engaged in a thorough analysis of statutory provisions, our case law, and the case law of other jurisdictions reasoning that

[i]n *Pleasant*, which involved co-employee liability for recklessly operating a motor vehicle, we concluded that injury to another resulting from willful, wanton and reckless negligence should also be treated as an intentional injury for purposes of our Workers' Compensation Act. The *Pleasant* Court expressly refused to consider whether the same rationale would apply to employer misconduct. Nonetheless, *Pleasant* equated willful, wanton and reckless misconduct with intentional injury for Workers' Compensation purposes.

The plaintiff in *Barrino v. Radiator Specialty Co.*, 315 N.C. 500, 340 S.E.2d 295 (1986), urged us to extend the *Pleasant* rationale to injuries caused by an employer's willful and wanton misconduct. The plaintiff, administrator of the estate of the deceased employee, alleged in part that the decedent died as a

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result of severe burns and other injuries caused by an explosion and fire in the employer's plant. On the employer's motion for summary judgment, the plaintiff's forecast of evidence, which included the allegations of the complaint, tended to show as follows: the employer utilized ignitable concentrations of flammable gases and volatile flammable liquids at its plant, violated OSHANC regulations in the use of these substances, covered meters and turned off alarms designed to detect and warn of dangerous levels of explosive gases and vapors—all of which resulted in the explosion and fire which caused the employee's death.

A majority of this Court in *Barrino* refused to extend the *Pleasant* rationale to employer conduct, but only two of the four majority justices expressed the view that the plaintiff's injuries were solely by accident and that the remedies provided by the Act were exclusive. These two justices relied in part on *Freeman v. SCM Corporation*, 311 N.C. 294, 316 S.E.2d 81 (1984), a *per curiam* opinion which concluded that a complaint alleging injuries caused by the willful and wanton negligence of an employer should be dismissed for lack of subject matter jurisdiction under Rule 12(b)(1) of the North Carolina Rules of Civil Procedure because exclusive jurisdiction rested under the Workers' Compensation Act with the Industrial Commission.

The other two justices in the *Barrino* majority concurred on the ground that the plaintiff, having accepted workers' compensation benefits, was thereby barred from bringing a civil suit.

The three remaining justices dissented on the ground that the plaintiff's forecast of evidence was sufficient to raise a genuine issue of material fact as to whether the defendant-employer's conduct embodies a degree of culpability beyond negligence so as to allow the plaintiff to maintain a civil action. Believing the plaintiff's forecast of evidence was sufficient to survive summary judgment on the question of whether the employer was guilty of an intentional tort, the *Barrino* dissenters said:

As Prosser states: Intent is broader than a desire to bring about physical results. It must

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extend not only to those consequences which are desired, but also to those which the actor believes are substantially certain to follow from what he does. The death of Lora Ann Barrino the employee was, at the very least, substantially certain to occur given defendants' deliberate failure to observe even basic safety laws.

As discussed in a subsequent portion of this opinion, the dissenters also concluded that the plaintiff was not put to an election of remedies. They thus would have allowed the plaintiff's common law intentional tort claim to proceed to trial on the theory that the defendant intentionally engaged in conduct knowing it was substantially certain to cause serious injury or death. They would also have allowed the plaintiff to pursue both a workers' compensation claim and a civil action.

Today we adopt the views of the *Barrino* dissent. *We hold that when an employer intentionally engages in misconduct knowing it is substantially certain to cause serious injury or death to employees and an employee is injured or killed by that misconduct, that employee, or the personal representative of the estate in case of death, may pursue a civil action against the employer.* Such misconduct is tantamount to an intentional tort, and civil actions based thereon are not barred by the exclusivity provisions of the Act. Because, as also discussed in a subsequent portion of this opinion, the injury or death caused by such misconduct is nonetheless the result of an accident under the Act, workers' compensation claims may also be pursued. There may, however, only be one recovery. We believe this holding conforms with general legal principles and is true to the legislative intent when considered in light of the Act's underlying purposes.

*Id.* at 339-41, 407 S.E.2d at 227-28 (emphasis added) (citations, quotation marks, ellipses, and brackets omitted). The Court further explained,

Our holding is consistent with general concepts of tort liability outside the workers' compensation context. The gradations of tortious conduct can best be understood as a continuum. The most aggravated con-

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duct is where the actor actually intends the probable consequences of his conduct. One who intentionally engages in conduct knowing that particular results are substantially certain to follow also intends the results for purposes of tort liability. Intent is broader than a desire to bring about physical results. It extends not only to those consequences which are desired, but also to those which the actor believes are substantially certain to follow from what the actor does. This is the doctrine of constructive intent. As the probability that a certain consequence will follow decreases, and becomes less than substantially certain, the actor's conduct loses the character of intent, and becomes mere recklessness. As the probability decreases further, and amounts only to a risk that the result will follow, it becomes ordinary negligence.

Prosser discusses the tortious conduct continuum:

Lying between intent to do harm, which includes proceeding with knowledge that the harm is substantially certain to occur, and the mere unreasonable risk of harm to another involved in ordinary negligence, there is a penumbra of what has been called quasi-intent. To this area, the words willful, wanton, or reckless, are customarily applied; and sometimes, in a single sentence, all three.

*Id.* at 341, 407 S.E.2d at 228-29 (citations, quotation marks, ellipses, and brackets omitted).

**D. *Woodson* Exception Noted But Not Applied**

Cases subsequent to *Woodson* have noted its exception to the exclusivity provisions, but these cases have yet to satisfy *Woodson*'s requirements:

Under the Workers' Compensation Act, an employee's remedies are exclusive as against the employer where the injury is caused by an accident arising out of and in the course of employment. Thus, the exclusivity provision of the Act precludes a claim for ordinary negligence, even when the employer's conduct constitutes willful or wanton negligence. However, an exception to this exclusivity exists for claims meeting the stringent proof standards of *Woodson*, 329 N.C. 330, 407 S.E.2d

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222. *Woodson* permits a plaintiff to pursue both a workers' compensation suit and a civil suit against an employer in those narrowly limited cases where injury or death was the result of intentional conduct by an employer which the employer knew was substantially certain to cause serious injury or death. *Willful and wanton negligence alone is not enough to establish a Woodson claim*; a higher degree of negligence is required. The conduct must be so egregious as to be tantamount to an intentional tort.

*Wake County Hosp. Sys. v. Safety Nat. Casualty Corp.*, 127 N.C. App. 33, 40-41, 487 S.E.2d 789, 793 (emphasis added) (citations, quotation marks, ellipses, and brackets omitted) (rejecting *Woodson* exception for negligent hiring or retention claim where a woman was murdered by co-employee with a criminal record noting that "the only allegations contained in the complaint in the Crews lawsuit that could possibly be construed as asserting a *Woodson* claim were that the Hospital hired a laundry employee with a relatively minor criminal record, and failed to fire that employee even though it had knowledge that he had engaged in sexual relations with other hospital employees at work, knew that he had a violent temper, and had knowledge of his alleged but unproven altercations with female co-employees in which no one was injured. Though these allegations may be sufficient to allege that the Hospital was negligent in hiring and retaining Sexton, the allegations are insufficient to allege conduct on the part of the Hospital substantially certain to cause injury or death and, therefore, do not meet the stringent requirements of *Woodson*. Without a *Woodson* claim, workers' compensation is the only remedy available in this case; any other action is barred as a matter of law"), *disc. review denied*, 347 N.C. 410, 494 S.E.2d 600 (1997).

Specifically, regarding the issue of emotional distress, *Woodson* was again noted, but rejected where the plaintiff "allege[ed] that defendants failed to investigate [her co-employee's,] Fields'[,] application, and as a result he assaulted her during the robbery causing her severe emotional distress." *Caple v. Bullard Restaurants, Inc.*, 152 N.C. App. 421, 428, 567 S.E.2d 828, 833 (2002). This Court stated that

as in *Wake County Hosp. Sys.*, such conduct, at best, only shows that defendants were negligent in hiring and retaining Fields. It would still be insufficient to allege conduct on the part of defendants substantially certain

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to cause injury or death and, therefore, does not meet the stringent requirements of *Woodson*.

*Id.* (citation, quotation marks, and brackets omitted).

E. *Woodson* Does Not Apply Here

While we recognize that plaintiff's claim was not stated as a *Woodson* claim, based upon the jury's verdict and the issue raised by defendant, we have no choice but to consider whether the trial court could properly have had jurisdiction over plaintiff's NIED claim as a *Woodson* claim. Yet this Court is unaware of a single litigant in any case which has been subject to appellate review who has successfully pursued a *Woodson* claim since the exception to the exclusivity provisions was set out in 1991. See *Woodson*, 329 N.C. 330, 407 S.E.2d 222. As *Wake County Hosp. Sys.* stated, even under *Woodson*, "[w]illful and wanton negligence alone is not enough to establish a *Woodson* claim; a higher degree of negligence is required. The conduct must be so egregious as to be tantamount to an intentional tort." 127 N.C. App. at 40, 487 S.E.2d at 793. Here, all the jury found was willful and wanton negligence on the part of defendant. Although plaintiff filed a complaint, an amended complaint, and attempted to amend her complaint a second time, alleging nine total different claims between the three documents, eight of the claims were regarding intentional conduct, but plaintiff only actually prevailed on one negligence claim. Accordingly, we conclude that the *Woodson* exception to the exclusivity provisions does not apply to plaintiff in this case.

F. Plaintiff's NIED Claim

We are thus left with a claim for NIED which occurred in plaintiff's workplace; so to determine if it was a claim which was under the exclusive jurisdiction of the Industrial Commission, we must consider if the claim falls within the purview of the Workers Compensation Act. "In order for an injury to be compensable under the Workers' Compensation Act, a claimant must prove: (1) that the injury was caused by an accident; (2) that the injury arose out of the employment; and (3) that the injury was sustained in the course of employment." *Wake County Hosp. Sys.*, 127 N.C. App. at 38-39, 487 S.E.2d at 792. (citation, quotation marks, and brackets omitted). North Carolina General Statute § 97-2(6) defines "[i]njury and personal injury" as "only injury by accident arising out of and in the course of the employment, and shall not include a disease in any



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form, except where it results naturally and unavoidably from the accident.” N.C. Gen. Stat. § 97-2(6) (2007). “Injury” includes mental injury. *Jordan v. Central Piedmont Community College*, 124 N.C. App. 112, 118-19, 476 S.E.2d 410, 414 (1996) (“While the claim in this case involves an injury by accident as opposed to an occupational disease, *we do not read or interpret the Act as limiting compensation for mental conditions to only occupational diseases, excluding mental injuries by accident.* As the Supreme Court in *Ruark* pointed out, our courts have recognized the compensability of mental injuries under tort law since the late nineteenth century. Furthermore, mental conditions have been acknowledged and compensated as occupational diseases under our Workers’ Compensation Act. *We cannot conclude that mental injuries by accident are not covered under the Act when we have clearly awarded workers’ compensation for mental conditions as occupational diseases.* Such a holding would lead to harsh results and would be incongruous in light of our well established history of compensating mental injuries under general principles of tort law.” (emphasis added) (citation omitted)), *disc. review denied*, 345 N.C. 753, 485 S.E.2d 53 (1997). “‘Accident’ under the Act means (1) an unlooked for and untoward event which is not expected or designed by the injured employee; (2) a result produced by a fortuitous cause.” *Woodson*, 329 N.C. at 348, 407 S.E.2d at 233 (citations and quotation marks omitted).

“Arising out of” the employment is construed to require that the injury be incurred because of a condition or risk created by the job. In other words, the basic question to answer when examining the arising out of requirement is whether the employment was a contributing cause of the injury. Our Supreme Court has held that, generally, an injury arises out of the employment when it is a natural and probable consequence or incident of the employment and a natural result of one of its risks, so that there is some causal relation between the injury and the performance of some service of the employment. When an injury cannot fairly be traced to the employment as a contributing proximate cause, or if it comes from a hazard to which the employee would have been equally exposed apart from the employment, or from the hazard common to others, it does not arise out of the employment.

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*Mintz v. Verizon Wireless*, \_\_\_ N.C. App. \_\_\_, \_\_\_, \_\_\_ S.E.2d \_\_\_, \_\_\_ (Nov. 20, 2012) (No. COA12-306) (citations, quotation marks, and brackets omitted). “As used in the Workers’ Compensation Act the phrase, ‘in the course of the employment,’ refers to the time, place, and circumstances under which an accidental injury occurs; ‘arising out of the employment’ refers to the origin or cause of the accidental injury.” *Ramsey v. Southern Indus. Constructors Inc.*, 178 N.C. App. 25, 30, 630 S.E.2d 681, 685 (citation, quotation marks, and brackets omitted), *disc. review denied*, 361 N.C. 168, 639 S.E.2d 652 (2006).

Here, it is crucial to recall that based upon plaintiff’s allegations, the incident that caused plaintiff’s emotional distress was not the harassment by her supervisor, but the defendant’s mishandling of her complaints regarding that harassment. Plaintiff’s NIED claim alleged that “[t]he negligent actions of the Defendant . . . in the handling of Plaintiff’s situation and treatment of Plaintiff as alleged herein . . . show a reckless indifference to the likelihood that said actions would cause severe emotional distress to Plaintiff[;]” “Defendant negligently failed to offer an appropriate remedy to Plaintiff and wrongfully terminated Plaintiff[;] and “Defendant knew, or reasonably should have known, that its behavior would cause emotional distress to Plaintiff.” Accordingly, plaintiff’s NIED claim caused by defendant’s mishandling of her complaint would fall within the purview of the Industrial Commission as her emotional distress is an “injury” recognized by the Workers Compensation Act. *See* N.C. Gen. Stat. § 97-2(6); *Jordan*, 124 N.C. App. at 118-19, 476 S.E.2d at 414. Plaintiff’s “injury was caused by an *accident*” as defendant’s mishandling of her complaint was “an unlooked for and untoward event which is not expected or designed by the injured employee[.]” *Woodson*, 329 N.C. at 348, 407 S.E.2d at 233; *Wake County Hosp. Sys.*, 127 N.C. App. at 38, 487 S.E.2d at 792 (emphasis added). Plaintiff’s “injury arose out of the employment” in that complaining to an employer about harassment at work and the risk that the employer may not handle it properly “is a natural and probable consequence or incident of the employment and a natural result of one of its risks, so that there is some causal relation between the injury and the performance of some service of the employment.” *Mintz*, \_\_\_ N.C. App. at \_\_\_, \_\_\_ S.E.2d at \_\_\_. Plaintiff’s “injury was sustained in the course of employment” in that the mishandling of her complaints occurred while plaintiff was working for defendant. *Wake County Hosp. Sys.*, 127 N.C. App. at 38-39, 487 S.E.2d at 792; *see Ramsey*, 178 N.C. App. at 30, 630 S.E.2d at 685.

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## G. Summary

We again stress that this case is unique. Plaintiff's NIED claim regarding the mishandling of her harassment complaints was valid, and her injuries were very real, yet she could not obtain relief from a jury because this case came to us not as claims for an intentional tort, gender or racial discrimination or wrongful termination, but solely as a NIED claim, an obviously negligence-based claim. Accordingly, although the issue on appeal only concerns plaintiff's NIED claim, plaintiff's other claims were not covered by the Workers' Compensation Act, particularly those involving intentional conduct; thus, it was proper for plaintiff to file all of her claims, except her claim for NIED, before the trial court *or* as in *Woodson*, plaintiff could have filed a claim before the Industrial Commission and requested that such claim be stayed until it had been determined which claims, if any, would be within the jurisdiction of the trial court. *See generally Woodson*, 329 N.C. 330, 407 S.E.2d 222.

As plaintiff's NIED claim was based upon the willful and wanton negligence of defendant, and as such conduct on the part of defendant falls within the purview of the Worker's Compensation Act but is not enough to sustain a *Woodson* claim and thereby qualify as an exception to the exclusivity provisions of the Workers' Compensation Act, the judgment awarding plaintiff \$450,000.00 must be vacated as the trial court was without jurisdiction to enter such a judgment.

## III. Conclusion

For the foregoing reasons, we vacate the judgment awarding plaintiff \$450,000.00. As we are vacating the judgment awarding plaintiff \$450,000.00 we need not address defendant's other issues on appeal.

VACATED.

Judges HUNTER, JR., Robert N. and BEASLEY concur.

Judge Beasley concurred prior to 18 December 2012.

**SPIVEY v. WRIGHT'S ROOFING**

[225 N.C. App. 106 (2013)]

DENNIS RAY SPIVEY, PLAINTIFF

v.

WRIGHT'S ROOFING, EMPLOYER/SUBCONTRACTOR, NONINSURED; RANDY WRIGHT, INDIVIDUALLY; AMS STAFF LEASING, EMPLOYER; DALLAS NATIONAL INSURANCE, CARRIER FOR WRIGHT'S ROOFING AND AMS STAFF LEASING; CRAWFORD & COMPANY, ADMINISTRATOR/SERVICING AGENT FOR DALLAS NATIONAL INSURANCE; BOYET BUILDERS, GENERAL CONTRACTOR; AND AUTO-OWNERS INSURANCE, CARRIER [FOR BOYET BUILDERS], DEFENDANTS

No. COA12-270

Filed 15 January 2013

**1. Workers' Compensation—Form 60 admission of liability—unilateral mistake—no relief**

Defendants forfeited the ability to challenge their responsibility for paying plaintiff workers' compensation benefits by filing a Form 60. In doing so, defendants admitted the compensability of plaintiff's claim and their liability for making the necessary benefit payments, so that the basis for relief was a claim of unilateral mistake. An employer or carrier is not entitled to relief from a Form 60 based solely upon the fact that the party making the filing failed to adequately investigate all relevant issues before conceding compensability or liability.

**2. Workers' Compensation—uninsured employer—subcontractor—coverage previously carried**

The Industrial Commission did not err by failing to hold Boyet Builders, a contractor, liable for plaintiff's workers' compensation benefits under N.C.G.S. § 97-19 on the grounds that plaintiff was employed by a subcontractor that did not obtain workers' compensation coverage. It was held elsewhere in the opinion that the carrier for plaintiff's immediate employer was liable for plaintiff's workers' compensation benefits.

**3. Appeal and Error—motion for sanctions—frivolous appeal—denied**

The motion of three of the defendants for sanctions against other defendants under N.C. R. App. P. 34(a) for filing a frivolous appeal in a workers' compensation case was denied. Although the position of the appealing defendants was not strong and the underlying theme of the appeal was more equitable than legal in nature, the Court of Appeals denied the motion in its discretion.

**SPIVEY v. WRIGHT'S ROOFING**

[225 N.C. App. 106 (2013)]

Appeal by defendants from Opinion and Award entered 2 December 2011 by the North Carolina Industrial Commission. Heard in the Court of Appeals 30 August 2012.

*Crumley Roberts, LLP, by Michael T. Brown, Jr., for Plaintiff-appellee.*

*McAngus Goudelock and Courie, by Daniel L. McCullough, for Defendant-appellees Boyet Builders and Auto-Owners Insurance.*

*Teague Campbell Dennis & Gorham, L.L.P., by John A. Tomei and Tara D. Muller, for Defendant-appellants*

ERVIN, Judge.

Defendants AMS Staff Leasing, Dallas National Insurance Co., and Crawford & Company<sup>1</sup> appeal from a Commission order awarding Plaintiff Dennis Ray Spivey medical and disability benefits. On appeal, Defendants argue that the Commission erred by determining that they were bound by the Industrial Commission Form 60 which they had previously filed and by failing to determine that Defendant Boyet Builders was liable for payment of any workers' compensation benefits to which Plaintiff was entitled. After careful consideration of Defendants' challenges to the Commission's order in light of the record and the applicable law, we conclude the Commission's order should be affirmed.

### I. Factual Background

#### A. Substantive Facts

Plaintiff was employed by Wright's Roofing, which was a sole proprietorship owned by Randy Wright, between 2005 and 2008. During that time, Plaintiff worked either part-time or full-time, depending on availability of work, and was paid, for most of that period, by Wright's Roofing.

At some point during Plaintiff's initial period of employment, Mr. Wright contracted with AMS Staffing, a company that provides administrative services such as handling payroll, tax, and workers'

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1. The present appeal has been taken by Defendants AMS Staff Leasing, Dallas National Insurance, Co., and Crawford & Company, all of whom will be referred to collectively throughout the remainder of this opinion as "Defendants." The non-appealing defendants, Wright's Roofing, Boyet Builders, and Auto-Owners Insurance, will be identified by name as necessary.

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compensation insurance-related issues. According to the arrangement between Wright's Roofing and AMS Staffing, after Mr. Wright designated an employee as being "employed by" AMS Staffing, the employee would fill out an AMS Staffing form, Wright's Roofing would pay AMS Staffing for the work performed by the employee, and AMS Staffing would issue a paycheck to the employee. AMS Staffing also assumed responsibility for procuring workers' compensation coverage for the Wright's Roofing employees whose employment had been reported to AMS Staffing.

In October 2008, Plaintiff was asked to complete the forms required by AMS Staffing. After that time, Plaintiff's paychecks were issued by AMS Staffing, which withheld taxes and took care of other required deductions. In September, 2009, Plaintiff stopped working for Wright's Roofing due to a lack of available work. After Plaintiff stopped working for Wright's Roofing, Mr. Wright submitted a termination form to AMS Staffing in which Wright's Roofing informed AMS Staffing that Plaintiff was no longer employed by that business.

After a six or seven month gap, Plaintiff returned to work for Wright's Roofing in 2010. Upon returning to work at Wright's Roofing, Plaintiff performed the same essential tasks that he had performed during his earlier period of employment. Plaintiff did not, however, complete any AMS Staffing forms when he came back to work at Wright's Roofing. Instead, Plaintiff was paid with checks drawn on a Wright's Roofing account. At that time, only one of Wright's Roofing's employees was registered with AMS Staffing; Wright's Roofing paid for workers' compensation coverage for this single employee, but failed to provide workers' compensation insurance for its other employees.

On 28 June 2010, Plaintiff was working on a residential roof at a job for which Defendant Boyet Builders, the general contractor, had hired Wright's Roofing as a subcontractor. As of that date, Wright's Roofing had not provided Boyet Builders with a certificate attesting that it was in compliance with applicable workers' compensation insurance requirements. On that date, Plaintiff fell from a ladder and suffered an admittedly compensable leg fracture for which Plaintiff was hospitalized and underwent surgery. As of the date of the hearing in this matter, Plaintiff had not yet returned to full time work.

**B. Procedural History**

On 19 July 2010, Plaintiff filed a Form 18 in which he formally reported the accident in which he had been involved and asserted a

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claim for workers' compensation benefits. Plaintiff filed an amended Form 18 on 22 July 2010. On 31 August 2010, Defendants filed a Form 60 in which they admitted that Plaintiff was entitled to receive workers' compensation benefits. On the same date, Defendant Crawford sent Plaintiff's counsel an email stating that:

Our client, Dallas National Ins., has agreed to accept this claim on a Form 60. We have requested TTD [(temporary total disability)] from 6-30 thru 8-31, 10 weeks, be issued and sent to Mr. Spivey. Additional TTD will be paid weekly. Related medical expenses will be paid in accordance with the fee schedule. Please acknowledge receipt and advise that you will waive the interrogatory responses.

In addition, Defendants sent a letter to Plaintiff's counsel in which a copy of the filed Form 60 was enclosed and by means of which Defendants advised Plaintiff's counsel that a disability check "should be coming to your client[.]" Pursuant to the filed Form 60, Defendants began paying weekly disability benefits at the rate of \$342.18 covering the period from 30 June 2010 through 7 September 2010, resulting in total benefit payments of \$3,763.00.

On 15 September 2010, Defendants filed a Form 63 and a Form 61 by means of which they denied liability and ceased making indemnity payments as of that date. Defendants informed the Commission that, after they filed the Form 60, they had "determined that they have no workers['] compensation coverage" applicable to Plaintiff and were "withdrawing" their Form 60. In response, Plaintiff filed a motion requesting that Defendant be ordered to continue making temporary total disability payments. Defendants replied to Plaintiff's motion by asserting that, after filing the Form 60, they had "discovered evidence" that entitled them to withdraw the Form 60 and to deny Plaintiff's claim. On 22 October 2010, the Commission issued an administrative order denying Plaintiff's motion and directing Plaintiff to "file a Form 33 to request an evidentiary hearing" at which the relevant issues would be addressed. As a result, on 27 October 2010, Plaintiff filed a Form 33 requesting that the extent to which Defendants were entitled to withdraw the Form 60 and contest their liability for Plaintiff's workers' compensation benefits be set for hearing.

On the same date, Plaintiff filed a second amended Form 18 in which he named Wright's Roofing as Plaintiff's employer, Dallas National as Wright's carrier, and Boyet Builders as the general con-

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tractor at the construction project at which Plaintiff was working when he was injured. Boyet Builders filed a response to Plaintiff's request for a hearing in which it stated that Plaintiff was not its employee, that it was not liable as a statutory employer pursuant to N.C. Gen. Stat. § 97-19, and that "[Dallas National] has already accepted the compensability of this claim via a Form 60 dated August 31, 2010 and has therefore incurred liability for benefits." On 5 January 2011, Boyet Builders denied Plaintiff's claim for workers' compensation benefits. On 17 January 2011, Plaintiff filed another Form 33 in which he contended that, after Dallas National filed a Form 60, it had "unilaterally, without Commission approval, stopped paying benefits."

A hearing was conducted before Deputy Commissioner Adrian Phillips on 9 February 2011. During this hearing, Plaintiff moved that Defendants be directed to reinstate temporary total disability benefits pending a final decision regarding liability. Deputy Commissioner Phillips allowed Plaintiff's motion on 21 February 2011. On 19 May 2011, Deputy Commissioner Phillips entered an order holding Boyet Builders and Auto-Owners Insurance liable for Plaintiff's workers' compensation benefits and ordering them to pay medical and temporary total disability benefits. On 24 May 2011, Boyet Builders and Auto Owners Insurance appealed to the Commission from Deputy Commissioner Phillips' order.

The Commission heard this case on 6 October 2011. On 2 December 2011, the Commission, by means of an order issued by Commissioner Danny Lee McDonald with the concurrence of Commission Chair Pamela T. Young and Commissioner Christopher Scott, determined that Defendants had no legal basis to withdraw the Form 60 which they had initially filed, and ordered Defendants to pay temporary total disability and medical benefits to Plaintiff. The Commission also concluded that Wright's Roofing did not have workers' compensation insurance applicable to Plaintiff on the date of his injury and imposed a fine upon Mr. Wright for failing to comply with the Workers' Compensation Act. Defendants noted an appeal to this Court from the Commission's order.

## II. Legal Analysis

### A. Standard of Review

"The standard of review in workers' compensation cases has been firmly established by the General Assembly and by numerous decisions of this Court. . . . Under the Workers' Compensation Act,



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‘[t]he Commission is the sole judge of the credibility of the witnesses and the weight to be given their testimony.’ Therefore, on appeal from an award of the Industrial Commission, review is limited to consideration of whether competent evidence supports the Commission’s findings of fact and whether the findings support the Commission’s conclusions of law. This ‘court’s duty goes no further than to determine whether the record contains any evidence tending to support the finding.’ ” *Richardson v. Maxim Healthcare/Allegis Grp.*, 362 N.C. 657, 660, 669 S.E.2d 582, 584 (2008) (quoting *Deese v. Champion Int’l Corp.*, 352 N.C. 109, 115, 530 S.E.2d 549, 552 (2000), and *Adams v. AVX Corp.*, 349 N.C. 676, 681, 509 S.E.2d 411, 414 (1998) (internal citation omitted)). “[F]indings of fact which are left unchallenged by the parties on appeal are ‘presumed to be supported by competent evidence’ and are, thus ‘conclusively established on appeal.’ ” *Chaisson v. Simpson*, 195 N.C. App. 463, 470, 673 S.E.2d 149, 156 (2009) (quoting *Johnson v. Herbie’s Place*, 157 N.C. App. 168, 180, 579 S.E.2d 110, 118, *disc. review denied*, 357 N.C. 460, 585 S.E.2d 760 (2003)). The “Commission’s conclusions of law are reviewed de novo.” *McRae v. Toastmaster, Inc.*, 358 N.C. 488, 496, 597 S.E.2d 695, 701 (2004) (citation omitted). We will now utilize this standard of review in order to evaluate Defendants’ challenges to the Commission’s order.

**B. Effect of Filing a Form 60****1. Applicable Legal Principles**

According to N.C. Gen. Stat. § 97-82(b):

Payment pursuant to [N.C. Gen. Stat. §] 97-18(b) or payment pursuant to [N.C. Gen. Stat. §] 97-18(d) when compensability and liability are not contested prior to expiration of the period for payment without prejudice, shall constitute an award of the Commission on the question of compensability of and the insurer’s liability for the injury for which payment was made. Compensation paid in these circumstances shall constitute payment of compensation pursuant to an award under this Article.

In other words, “[t]he employer’s filing of a Form 60 is an admission of compensability. Thereafter, the employer’s payment of compensation pursuant to the Form 60 is an award of the Commission on the issue of compensability of the injury.” *Perez v. American Airlines/AMR Corp.*, 174 N.C. App. 128, 135-36, 620 S.E.2d 288, 293

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(2005) (citing *Sims v. Charmes/Arby's Roast Beef*, 142 N.C. App. 154, 159, 542 S.E.2d 277, 281, *disc. review denied*, 353 N.C. 729, 550 S.E.2d 782 (2001), and *Calhoun v. Wayne Dennis Heating & Air Cond.*, 129 N.C. App. 794, 798, 501 S.E.2d 346, 349 (1998), *disc. review dismissed*, 350 N.C. 92, 532 S.E.2d 524 (1999)), *disc. review improvidently allowed*, 360 N.C. 587, 634 S.E.2d 887 (2006). Thus, an employer who files a Form 60 waives the right to contest a claim that it is liable for a claimant's injury:

In *Olivares-Juarez v. Showell Farms*, 138 N.C. App. 663, 532 S.E.2d 198 (2000), the employer made direct payments to the injured employee pursuant to [N.C. Gen. Stat.] § 97-18(d), using the Industrial Commission Form 63 . . . beyond the 90-day statutory period[.] . . . [T]he employer had waived its right to contest the compensability of or its liability for the employee's injury. The status of the employer who pays compensation without prejudice beyond the statutory period is therefore the same as the employer who files Form 60 pursuant to [N.C. Gen. Stat.] § 97-18(b). That is, in both circumstances the employers will be deemed to have admitted liability and compensability.

*Sims v. Charmes*, 142 N.C. App. at 159, 542 S.E.2d at 281.

As a general rule, once a party has filed a Form 60, that filing will not be set aside on the basis of the party's unilateral mistake or failure to investigate the claim prior to admitting liability. For example, in *Higgins v. Michael Powell Builders*, 132 N.C. App. 720, 515 S.E.2d 17 (1999), the carrier admitted liability for the claimant's injury by filing a Form 63 and failing to contest the claim within 90 days.<sup>2</sup> Subsequently, the carrier unsuccessfully sought relief from the binding effect of the Form 63 on the grounds of excusable neglect, mutual mistake, or newly discovered evidence, based on the defendant's contention that the claimant was a subcontractor rather than an employee. On appeal, we affirmed the Commission's determination

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2. A Form 63 is filed pursuant to N.C. Gen. Stat. § 97-18(d), which provides that, if "the employer or insurer is uncertain on reasonable grounds whether the claim is compensable or whether it has liability for the claim under this Article, the employer or insurer may initiate compensation payments without prejudice and without admitting liability." However, "[i]f the employer or insurer does not contest the compensability of the claim or its liability therefor within 90 days from the date it first has written or actual notice of the injury or death . . . it waives the right to contest the compensability of and its liability for the claim" in the absence of newly-discovered evidence.

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that the “plaintiff’s employment status was ‘at all times reasonably discoverable’ by both the employer and the carrier” and held that:

Having failed to reasonably investigate the claim, [Defendant] cannot now assert that the information was not reasonably available. Pursuant to the provisions of [N.C. Gen. Stat.] § 97-18(d), defendants have waived their right to contest the compensability of plaintiff’s injuries, and the award of compensation has become final as provided by [N.C. Gen. Stat.] § 97-82(b).

*Higgins*, 132 N.C. App. at 7225, 515 S.E.2d at 20. In addition, we also held that an award resulting from a filed Form 60 could not be set aside on the grounds of “mutual mistake:”

Because the doctrines of mutual mistake, misrepresentation, and fraud generally apply to *agreements* between parties, these doctrines will not provide grounds to set aside an award not based upon such an agreement. . . . The Commission’s award does not adopt an agreement between the parties; rather, the award derives from defendant’s unilateral initiation of payment of compensation and subsequent failure to contest the claim under [N.C. Gen. Stat.] § 97-18(d). Therefore, the doctrines of mutual mistake, misrepresentation, and fraud do not operate to afford [Defendant] relief from the award.

*Higgins* at 726-27, 515 S.E.2d at 21-22 (emphasis in original) (citing *McAninch v. Buncombe County Schools*, 347 N.C. 126, 132, 489 S.E.2d 375, 379 (1997), and *Creech v. Melnik*, 347 N.C. 520, 527, 495 S.E.2d 907, 911-12 (1998)) (other citations omitted). As a result, well-established North Carolina law clearly places the burden on the employer or carrier to determine whether a particular claim is compensable and whether the employer or carrier is liable before filing a Form 60.

The principle that an employer or carrier is not entitled to relief from a Form 60 on unilateral mistake grounds is consistent with other decisions holding that a workers’ compensation award will not be set aside based upon a party’s unilateral mistake. For example, in *Smith v. First Choice Servs.*, 158 N.C. App. 244, 249, 580 S.E.2d 743, 748, *disc. review denied*, 357 N.C. 461, 586 S.E.2d 99 (2003), the claimant was an officer of the employer. On appeal, we affirmed the Commission’s decision that, because the workers’ compensation pol-

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icy included coverage for company officers, the carrier was liable for the plaintiff's compensable injury even though the extension of coverage to officers in the relevant policy provisions may have resulted from a unilateral mistake on the part of the carrier. *See also Brookover v. Borden, Inc.*, 100 N.C. App. 754, 398 S.E.2d 604 (1990), *disc. review denied*, 328 N.C. 270, 400 S.E.2d 450 (1991) (holding that a unilateral mistake by an unrepresented claimant would not support a decision to set aside a settlement agreement that the plaintiff had signed). Similarly, this rule is consistent with the basic principle that "[t]he duty to read an instrument or to have it read before signing it, is a positive one, and the failure to do so, in the absence of any mistake, fraud or oppression, is a circumstance against which no relief may be had, either at law or in equity." *Mills v. Lynch*, 259 N.C. 359, 362, 130 S.E.2d 541, 543-44 (1963) (quoting *Furst v. Merritt*, 190 N.C. 397, 402, 130 S.E. 40, 43 (1925)).

In recognition of the fact that a Form 60 may not be set aside based upon a unilateral mistake by the employer or carrier, we recently upheld the imposition of sanctions against defendants who persisted in challenging a previously-filed Form 60 on such a basis. In *Kennedy v. Minuteman Powerboss*, \_\_\_ N.C. App \_\_\_, 725 S.E.2d 923 (2012) (2012 N.C. App. LEXIS 670) (unpublished), the carrier filed a Form 60 which it later tried to withdraw on the grounds that, at the time it filed the Form 60, it had not known that the claimant had suffered an earlier back injury for which he was taking pain medication. The Commission sanctioned Defendants for stubborn, unfounded litigiousness based on their decision to continue to prosecute a motion to set aside the Form 60 on this basis. On appeal, we upheld the Commission's decision to impose sanctions, stating that:

First, the Full Commission properly concluded, as a matter of law, that a Form 60 cannot be set aside based upon mutual mistake. Second, "an employer who files a Form 60 pursuant to N.C. Gen. Stat. § 97-18(b)," . . . "will be deemed to have admitted liability and compensability." . . . Had defendants wished to investigate either the incident or [claimant's] medical history, they could have filed a Form 63, pursuant to N.C. Gen. Stat. § 97-18(d), which would have allowed them to investigate the compensability of [his] accident. . . . [D]efendants, after admitting compensability via a Form 60, continued to challenge that admitted compensability based upon (1) a legally impossible basis and (2) their own lack of due diligence.

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*Kennedy*, 2012 N.C. LEXIS 670, \*14 (citing *Higgins*, 132 N.C. App. at 726-27, 515 S.E.2d at 21-22, and quoting *Barbour v. Regis Corp.*, 167 N.C. App. 449, 453, 606 S.E.2d 119, 123 (2004)) (footnote omitted). As a result, this Court has made it crystal clear that an employer or carrier is not entitled to relief from a Form 60 based solely upon the fact that the party making the filing failed to adequately investigate all relevant issues before conceding compensability or liability.

## 2. Discussion

**[1]** On 31 August 2010, Defendants filed a Form 60, “Employer’s Admission of Employee’s Right to Compensation ([N.C. Gen. Stat.] § 97-18(b),” which listed Wright’s Roofing as Plaintiff’s employer and Dallas National c/o Crawford & Co. as the responsible insurance carrier. By filing this Form 60, Defendants admitted the compensability of Plaintiff’s claim and their liability for making the necessary benefit payments. As a result, given that the basis upon which they seek relief from the Form 60 rests upon a claim of unilateral mistake, Defendants have forfeited the ability to challenge their responsibility for paying workers’ compensation benefits to Plaintiff.

In seeking to persuade us to reach a contrary conclusion, Defendants initially argue that a Form 60 “does not bind a non-employer.” In other words, Defendants contend that, because Plaintiff’s return to Wright’s Roofing’s employment had not been reported to AMS Staffing at the time of his injury, he was not a co-employee of AMS Staffing and Wright’s Roofing, a fact which, in their view, means that Defendants are not bound by the Form 60. We do not find this argument persuasive.

This Court rejected an argument similar to Defendants’ that their filing of a Form 60 does “not bind a non-employer” in *Higgins*. In that case, the defendants sought to have a Form 63 set aside on the grounds that, rather than being “an employee of [the employer,]” the plaintiff “was, instead, a subcontractor.” In upholding the Commission’s decision to reject the defendants’ position, we noted that “[the claimant’s] employment status was ‘at all times reasonably discoverable’ by both the employer and the carrier.” *Higgins*, 132 N.C. App. at 722, 724, 515 S.E.2d at 19, 20. Defendants have not argued that Plaintiff’s employment status was not “reasonably discoverable” or made any other attempt to distinguish *Higgins* from the present case. As a result, we conclude that Defendants’ contention that questions about Plaintiff’s employment status provides support for a decision to revisit the Form 60 lacks adequate legal support.

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Secondly, Defendants argue that they are nothing more than “an innocent third party who simply made a mistake” and argue that, unless the Commission’s decision is reversed:

[A]ny employer, no matter how far removed from the plaintiff, who accidentally files a Form 60, would be forever prohibited from fixing his mistake and denying liability, even when, as in this case, another carrier is on the risk. Under that rationale, if Grocery Store tries to file a Form 60 for its employee Bob Smith but accidentally misspells the name and files one for Bob Smyth, a mechanic injured while working for Auto Body Shop, then Grocery Store would be held liable for paying the claim of Bob Smyth, even if Grocery Store quickly discovers and tries to retract the Form.

(emphasis in original). In addition, Defendants assert that, if the Commission’s order is upheld, “one mistake by a well-meaning servicing agent, even one who is completely unrelated to the injured employee, is forever irreparable.” We are not persuaded that this set of policy-based concerns justifies a decision to reverse the Commission’s order.

As an initial matter, the facts at issue here bear no resemblance to the hypothetical scenario outlined by Defendants, given that Defendants are not strangers lacking any connection to Plaintiff. The undisputed evidence contained in the present record shows that (1) Wright’s Roofing was subject to the Workers’ Compensation Act and, therefore, legally required to obtain workers’ compensation insurance for its employees, including Plaintiff; (2) Mr. Wright contracted with AMS Staffing for the purpose of, among other things, obtaining workers’ compensation insurance for designated employees, with Dallas National being the carrier responsible for covering Wrights’ Roofing’s employees under this arrangement; and (3) Plaintiff had previously been one of the designated employees for whom AMS Staffing had provided workers’ compensation insurance coverage and, when Plaintiff returned to work for Wright’s Roofing, the company should have required him to complete the relevant AMS Staffing forms, but did not do so. As a result, Defendants were not “completely unrelated” to Plaintiff’s employment; on the contrary, they were the parties with whom Wright’s Roofing had previously contracted for the purpose of obtaining workers’ compensation coverage applicable to Plaintiff and with whom Plaintiff should have been covered at the time of his injury.

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In addition, we are unable to agree with Defendants' contention that a decision to uphold the Commission's order would make it possible for an "innocent third party" to accidentally incur liability for the workers' compensation benefits owed to a claimant with whom it had no relationship. A properly completed Form 60 must indicate (1) the claimant's name, address, phone number, and date of birth; (2) the claimant's employer and the employer's insurance carrier; and (3) the date of the claimant's injury and the nature of the injury. As should be obvious, the inclusion of this information will correctly identify the specific claimant and distinguish him or her from some other person with a similarly spelled name. Thus, we do not believe that a decision to uphold the Commission's order will result in the imposition of liability upon entities with utterly no relationship to a claimant, as Defendants suggest.

Finally, we reject Defendants' remaining justifications for setting aside the Form 60. For example, Defendants argue that the Form 60 should be set aside due to "mutual mistake." However, as discussed above, we have previously held that the doctrine of mutual mistake is not applicable to a workers' compensation award made pursuant to a Form 60. *Higgins*, 132 N.C. App. at 726-27, 515 S.E.2d at 21-22. In addition, Defendants contend that, since a Form 60 is treated as a Commission decision, it should be subject to revision or modification pursuant to the Commission's inherent authority to vacate an award that "it admits is contrary to law." However, we have concluded that the Commission's decision is not "contrary to law," a fact which precludes application of the authority upon which Defendants rely. Although Defendants argue that they should not be estopped from denying liability, the Commission expressly determined that the Form 60 "cannot be set aside, rendering the issue of estoppel moot." For that reason, we need not reach the estoppel issue. Finally, Defendants cite no authority for their contention that the Form 60 that they filed may be set aside because they did not determine, prior to filing, that Plaintiff was no longer a designated co-employee covered by their workers' compensation policy, and we know of none. As a result, for all of these reasons, we conclude that the Commission properly determined that Defendants were not entitled to have the Form 60 in which they admitted liability to Plaintiff set aside.

**C. Liability of Boyet Builders**

**[2]** Secondly, Defendants argue that the Commission erred by failing to hold Boyet Builders responsible for paying Plaintiff's workers'

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compensation benefits pursuant to N.C. Gen. Stat. § 97-19. We are unable to agree with Defendants' contention.

N.C. Gen. Stat. § 97-19 provides, in pertinent part, that:

Any principal contractor . . . who shall sublet any contract for the performance of any work without requiring from such subcontractor . . . a certificate of compliance . . . stating that such subcontractor has complied with [N.C. Gen. Stat. §] 97-93 hereof, shall be liable . . . to the same extent as such subcontractor would be if he were subject to the provisions of this Article for the payment of compensation and other benefits. . . .

As this Court has previously noted, "the 'chain of liability [for making workers' compensation payments] extends from the immediate employer of the injured employee up the chain to the first responsible contractor who has the ability to pay.'" *Robertson v. Hagood Homes, Inc.*, 160 N.C. App. 137, 145, 584 S.E.2d 871, 876 (2003) (quoting from Commission's order). As a result, "[N.C. Gen. Stat. §] 97-19 applies only when two conditions are met. First, the injured employee must be working for a subcontractor doing work which has been contracted to it by a principal contractor. Second, the subcontractor does not have workers' compensation insurance coverage covering the injured employee." *Rich v. R.L. Casey, Inc.*, 118 N.C. App. 156, 159, 454 S.E.2d 666, 667 (1995) (citing *Zocco v. U.S. Dept. of Army*, 791 F. Supp. 595, 599 (E.D.N.C. 1992)), *disc. rev. denied*, 340 N.C. 360, 458 S.E.2d 190 (1995). As a result, Boyet Builders is not liable for Plaintiff's workers' compensation benefits in the absence of a determination that no coverage is available through Plaintiff's immediate employer, Wright's Roofing.

In view of Defendants' apparent recognition of this limitation on Boyet Builder's liability, they claim that Boyet Builders should be held liable for Plaintiff's workers' compensation benefits "in the absence of any other workers' compensation insurance coverage as more fully explained" earlier in their brief. However, we have already upheld the Commission's decision that the carrier for Plaintiff's immediate employer is liable for Plaintiff's workers' compensation benefits. Given that this aspect of Defendant's challenge to the Commission's order rests on an inadequate factual basis and given Defendants' failure to cite any authority for the proposition that a general contractor should be held liable when the immediate employer's carrier has admitted its liability, we conclude that the Commission did not err by



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failing to hold Boyet Builders liable for Plaintiff's workers' compensation benefits.

**D. Motion for Sanctions**

**[3]** Finally, N.C.R. App. P. 34(a) provides that an appellate court “may, on its own initiative or motion of a party, impose a sanction against a party or attorney or both when the court determines that an appeal . . . was frivolous because of one or more of the following: (1) the appeal was not well grounded in fact and was not warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law.” On 22 June 2012, Boyet Builders and Auto-Owners Insurance filed a motion seeking the imposition of sanctions on Defendants on the grounds that their appeal “is frivolous, not supported by any factual evidence in the record, not warranted by existing and well-established law, and sets forth no good argument for modifying the same.” In support of their motion, these parties note that the law is settled as to an employer's or carrier's liability upon filing a Form 60, that Defendants failed to distinguish *Higgins*, and cite *Kennedy*, in which we upheld the imposition of sanctions by the Commission under circumstances similar to this case. On 2 July 2012, Defendants filed a response to the motion for sanctions in which they argued that the Commission erroneously “allowed the general contractor to walk away with no penalty or any obligation to pay anything to plaintiff” “solely on the basis that [Defendants] had accidentally admitted compensability shortly after the accident, based on the mistaken belief that plaintiff was employed through AMS.” In addition, Defendants contend that, because they “prevailed at the Deputy Commissioner level of the Industrial Commission on all pending issues” it was “entirely reasonable for AMS/Dallas/Crawford to appeal the Full Commission's reversal.”

As we have already demonstrated, the Commission correctly ruled that Defendants were bound by their admission of compensability. Although we agree with Boyet Builders and Auto-Owners Insurance that Defendants' position was not a strong one and interpret the underlying theme of Defendants' challenge to the Commission's order to be more equitable than legal in nature, we conclude, “[i]n our discretion,” that sanctions should not be imposed upon counsel pursuant to Rule 34. *State v. Hudgins*, 195 N.C. App. 430, 436, 672 S.E.2d 717, 721 (2009). As a result, the motion for sanctions is denied.

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III. Conclusion

Thus, for the reasons discussed above, we conclude that none of Defendants' challenges to the Commission's order have any merit and that Defendants' counsel should not be subject to sanctions pursuant to N.C.R. App. P. 34 for pursuing a frivolous appeal. As a result, the Commission's order should be, and hereby is, affirmed, and Boyet Builders' and Auto-Owners Insurance's motion for sanctions should be, and hereby is, denied.

AFFIRMED; MOTION FOR SANCTIONS DENIED.

Judges ROBERT N. HUNTER, JR., and McCULLOUGH concur.

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STATE OF NORTH CAROLINA EX REL. UTILITIES COMMISSION; PUBLIC STAFF —  
UTILITIES COMMISSION, INTERVENOR-APPELLEES

v.

CAROLINA WATER SERVICE, INC. OF NORTH CAROLINA, APPLICANT-APPELLANT

AND

CHARLOTTE-MECKLENBURG UTILITIES, A DEPARTMENT OF THE CITY OF  
CHARLOTTE, INTERVENOR-APPELLANT

No. COA12-475

Filed 15 January 2013

**1. Utilities—sale of water system—allocation of gain—findings**

Where the City of Charlotte annexed property and Charlotte-Mecklenburg Utilities ("CMU") took over an existing water system (Carolina Water Service, Inc. of North Carolina (CWSNC)), the Utilities Commission's findings were supported by competent, material, and substantial evidence and justified the Commission's conclusion to allocate an estimated \$3.36 million of the gain on sale to CWSNC's remaining ratepayers. A decision of the Commission is presumed to be just and reasonable and the evidence relied on by the Commission in this case was comprehensive, thorough, well thought out, based on the testimony of witnesses for the Public Staff as well as the Utility, and supported by precise data concerning the nature of the transfer.

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**2. Utilities—sale of water system—allocation of gain—Commission policy—not arbitrary and capricious**

Although appellants argued that a Utilities Commission's order should be overturned as arbitrary and capricious because the Commission's policy concerning allocation of the gain from the sale of water systems and its exception were poorly defined, the validity of the policy was addressed in prior cases and found not to be arbitrary and capricious.

**3. Utilities—sale of water system—allocation of gain—Commission's policy—not arbitrary as applied**

The Utilities Commission's application of its policy concerning gain from the sale of water systems, even when compared with the Commission's contrary decision in a different case on the same day, was carefully considered, the result of reasoned judgment, and not arbitrary and capricious as applied.

**4. Utilities—sale of water system—allocation of gain—Commission's authority**

The Utilities Commission did not exceed its statutory authority by allocating a portion of the gain on sale of a water utility to ratepayers and thus committed no error of law in an action arising from the City of Charlotte's annexation of property and the purchase of an existing water system. Contrary to the argument of the purchased utility, the Commission's authority exists under chapter 62 of the North Carolina General Statutes, not "general ratemaking principles." The allocation of a portion of the gain on sale falls within the auspices of the policy established by that statute.

**5. Utilities—sale of water system—allocation of gain—due process and equal protection rights of utility—not violated**

The Utilities Commission's order allocating the gain from the sale of a water system was based on reasoned decision making, and was neither arbitrary and capricious nor lacking a legitimate government purpose. Neither the utility's due process nor equal protection rights were violated.

**6. Utilities—sale of water system—allocation of gain—not confiscation of property**

The Utilities Commission's allocation of a portion of the gain on the sale of a water system did not constitute a confiscation of property without just compensation in violation of Article I, section 19, of the North Carolina Constitution. Although the utility

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argued that it held vested rights because of its reliance during contracting on the Commission's longstanding policy, the Commission is empowered by the legislature to regulate utilities and, with that, allocate a portion of the gain on sale to either the utility or its ratepayers. The merits of the Commission's policy were not commented upon beyond a police power review that found no constitutional violation.

Appeal by appellants from order entered 23 December 2011 by the North Carolina Utilities Commission. Heard in the Court of Appeals on 26 September 2012.

*Poyner Spruill LLP, by Robert F. Orr, Christopher J. Ayers, and Andrew H. Erteschik, for Applicant-Appellant Carolina Water Service, Inc. of North Carolina.*

*Styers & Kemerait, PLLC, by Karen M. Kemerait and M. Gray Styers, Jr., for Intervenor-Appellant Charlotte-Mecklenburg Utilities, A Department of the City of Charlotte.*

*Public Staff, Robert P. Gruber, Executive Director, by David T. Drooz, for Intervenor-Appellee the North Carolina Utilities Commission.*

STEPHENS, Judge.

*Factual Background and Procedural History*

This case arises out of an agreement between the Applicant-Appellant, Carolina Water Service, Inc. of North Carolina ("CWSNC" or "the Utility") and the Intervenor-Appellant, Charlotte-Mecklenburg Utilities ("CMU"), which is a branch of the City of Charlotte ("the City"). CWSNC is a publicly franchised utility that provides water and sewer services to customers in the State of North Carolina. Among its customers are the residents of an area referred to as the "Cabarrus Woods Systems," which exists just east of the Mecklenburg County line in Cabarrus County, North Carolina.

On 30 June 2009, the City annexed the Cabarrus Woods Systems, making it a part of the City of Charlotte. By doing so, the City took on a legal obligation to provide the area with water and sewer services under chapter 160A of the North Carolina General Statutes and the City's own policies. In order to avoid duplicating the current infrastructure and still meet its obligation to provide water and sewer services, CMU entered into a "tentative agreement" with CWSNC in early

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2009 to purchase the Utility's existing water and sewer facilities and adapt them for use by the City. Under that agreement, CMU would pay CWSNC \$25.7 million for the right to use CWSNC's existing water and sewer infrastructure. Because the current infrastructure was valued at approximately \$6.5 million (as of 30 August 2011), CWSNC would realize a "gain on sale"<sup>1</sup> of approximately \$19.2 million with the completion of its \$25.7 million transaction with the City. The contract between CMU and CWSNC also includes an "escape clause," which allows CWSNC to terminate the agreement if the North Carolina Utilities Commission ("the Commission") does not approve assignment of 100% of the gain on sale to CWSNC's shareholders.

With regard to the allocation of customers, the agreement between CWSNC and the City would result in the transfer of between 10% and 25% of those individuals serviced by CWSNC to the City. Specifically, 2,849 of CWSNC's 21,650 water customers (13.2%) and 3,359 of CWSNC's 13,585 sewer customers (24.7%) would be transferred from CWSNC to the City. Because of the nature of economies of scale (*i.e.*, those cost advantages that come with having a larger customer base),<sup>2</sup> customers who would be transferred from CWSNC to CMU could expect an average reduction of \$34.53 in their monthly water and sewer bill (from \$80.70 to \$46.17 per month—a 42.8% decline), and customers staying with CWSNC could expect an average increase of \$4.78 in their monthly water and sewer bill (from \$80.70 to \$85.48 per month—a 5.9% rise). As a result, the newly inducted members of CMU's water and utilities service could expect an average yearly bill of \$554.04 if they paid for both services, and CWSNC's remaining customers could expect an average yearly bill of \$1,025.76 if they did the same.

On 3 March 2011, CWSNC filed an application with the Commission to transfer the current water and sewer infrastructure located in the Cabarrus Woods Systems to the City. Two and a half

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1. In its brief, CWSNC defined "gain on sale" as "the difference in the purchase price of a utility system as compared to the utility system's actual value."

2. Though a lengthy discussion of the nature of economies of scale is unnecessary, Mr. Steven M. Lubertoizzi ("Lubertoizzi"), Executive Director of Regulatory Accounting and Affairs at Utilities, Inc., of which CWSNC is a subsidiary, provided a helpful explanation of the concept during his testimony. There he pointed out that a utilities system with a larger customer base is more easily "able to 'share' employees and costs associated with customer service, billing, and operations. Such costs are spread across a larger customer base, thus reducing the amount each customer pays toward such expenses. Customers also receive the savings associated with the utility's increased purchasing power . . . ."

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months later, on 17 May 2011, CMU moved to intervene and participate as a full party in CWSNC's application. The Commission granted CMU's motion to intervene and set the matter for an evidentiary hearing on 23 August 2011.

Four months after the hearing, on 23 December 2011, the Commission published its order and determined as a matter of fact that "[t]he transfer of the Cabarrus Woods Systems will have a significant adverse impact on the rates of the remaining [CWSNC] customers . . . ." In support of that finding, the Commission cited "an increase in the average water bill of \$2.37 per month and [an increase] in the average sewer bill of \$2.41 per month" for the remaining CWSNC customers. After considering a number of factors, the Commission determined that "overwhelming and compelling evidence [existed] to justify an exception to the Commission's . . . policy [(“the Policy”)] of assigning 100% of the gain on sale of water and/or sewer utility systems to utility company shareholders . . . ." In so holding, the Commission emphasized that it was employing a recognized and longstanding exception to the Policy. In conclusion, the Commission determined that "an estimated \$3.36 million or 17.5%" of the \$19.2 million gain on sale should be allocated to CWSNC's remaining ratepayers. The remaining \$15.83 million would be assigned to CWSNC's shareholders. Commissioner Tonola D. Brown-Bland filed a separate opinion, concurring in part and dissenting in part, arguing that "losses caused by losing the advantages of scale, no matter the magnitude, [do] not present overwhelming and compelling evidence to stray from the position of awarding 100% of gain to shareholders."

CWSNC and CMU appeal the Commission's 23 December 2011 order assigning \$3.36 million of the \$19.2 million gain on sale to the CWSNC ratepayers.

### *Standard of Review*

The extent of appellate review of decisions from the North Carolina Utilities Commission is described in the North Carolina General Statutes, chapter 62, section 94. *State ex rel. Utils. Comm'n v. Gen. Tel. Co. of Se.*, 281 N.C. 318, 336, 189 S.E.2d 705, 717 (1972). There the General Assembly has stipulated that "any . . . order made by the Commission under the provisions of [chapter 62, section 94] shall be prima facie just and reasonable." N.C. Gen. Stat. § 62-94(e) (2011).

A reviewing court may affirm or reverse an order of the Commission, declare it null and void, or remand the case for further proceedings if—after a review of the whole record—the Commission's

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findings, inferences, conclusions, or decisions prejudiced the substantial rights of the appellants (here, the rights of CWSNC and CMU) and were:

- (1) In violation of constitutional provisions, or
- (2) In excess of statutory authority or jurisdiction of the Commission, or
- (3) Made upon unlawful proceedings, or
- (4) Affected by other errors of law, or
- (5) Unsupported by competent, material and substantial evidence in view of the entire record as submitted, or
- (6) Arbitrary and capricious.

*Id.* at § 62-94(b)–(c). The Commission's findings may not be "reversed or modified by a reviewing court merely because the court would have reached a different finding or determination upon the evidence." *Gen. Tel. Co. of Se.*, 281 N.C. at 337, 189 S.E.2d at 717; *see also State ex rel. Utils. Comm'n, Carolina Power & Light Co. v. Carolina Indus. Group for Util. Rates*, 130 N.C. App. 636, 639, 503 S.E.2d 697, 699–700 (1998) ("[W]here there are two reasonably conflicting views of the evidence, the appellate court may not substitute its judgment for that of the Commission.").

*Discussion*

CWSNC and CMU argue on appeal that the Commission's decision was: (1) erroneous as not supported by competent, material, and substantial evidence; (2) arbitrary and capricious; (3) an error of law; and (4) a violation of constitutional provisions. We will address these arguments in the order they are presented.

*I. Competent, Material, and Substantial Evidence*

**[1]** If the Commission's findings of fact are supported by competent, material, and substantial evidence, then they are considered to be conclusive on appeal. *Gen. Tel. Co. of Se.*, 281 N.C. at 336–37, 189 S.E.2d at 717 (collecting cases). "Substantial evidence" is defined as "more than a scintilla or a permissible inference" and consists of "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *State ex rel. Utils. Comm'n v. S. Coach Co.*, 19 N.C. App. 597, 601, 199 S.E.2d 731, 733 (1973). A court

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typically presumes that the Commission has given proper consideration to all competent evidence presented “[i]n the absence of an express statement by the Commission to the contrary, some record evidence to the contrary, or a summary disposition which indicates to the contrary . . . .” *State ex. Rel. Utils. Comm’n v. Thornburg*, 316 N.C. 238, 244-45, 324 S.E.2d 28, 33 (1986). Further, in determining the validity of evidence presented before the Commission, the North Carolina Supreme Court has held that “it is for the administrative body, in an adjudicatory proceeding, to determine the weight and sufficiency of the evidence and the credibility of witnesses, to draw inferences from the facts, and to appraise conflicting and circumstantial evidence.” *State ex. Rel. Utils. Comm’n v. Thornburg*, 314 N.C. 509, 515, 334 S.E.2d 772, 775 (1985) (internal quotation marks and citation omitted) [hereinafter *Thornburg I*].

In support of its conclusion that “it is reasonable and appropriate to assign an estimated \$3.36 million or 17.5% of the gain on sale to the remaining ratepayers [at CWSNC],” the Commission made three pertinent findings of fact. First, the Commission found that, absent regulatory action, the transfer of the Cabarrus Woods Systems would have a “significant adverse impact” on the rates of the remaining CWSNC ratepayers, estimated to be an increase of \$2.37 (5.8%) per month in the average water bill and \$2.41 (6.0%) per month in the average sewer bill. Second, the Commission found that these significant adverse effects would be caused by the transfer of a large number of customers (6,208 ratepayers) from CWSNC, which constituted overwhelming and compelling evidence to justify an exception to the Policy. Third, the Commission found that “[t]he apportionment of 17.5% of the gain on sale to the remaining [CWSNC] ratepayers is necessary in order to offset the extraordinary and exceptional negative impact to such customers.”

In support of its findings, the Commission cited to the testimony of Public Staff witness Katherine A. Fernald (“Fernald”), Supervisor of the Water Section of the Public Staff—Accounting Division, who determined that the transfer of the Cabarrus Woods Systems from CWSNC to CMU would have a negative impact on the remaining CWSNC ratepayers without some sort of sharing in the gain on sale.

[Fernald] opined that in the past the large regulated water and sewer companies who were selling systems, such as [CWSNC], were growing in customer base at such a rate that the addition of new customers in other areas would quickly offset the loss of the customers being transferred. . . . [I]n



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recent years the rate of customer growth for water and sewer companies has declined, and for [CWSNC], the number of customers has actually decreased [during certain years].

On that reasoning the Commission concluded “it is likely that the increase in the cost of service for the remaining ratepayers . . . will not be offset by customer growth anytime soon,” noting Fernald’s clarification that “the detrimental impact on the remaining ratepayers will be especially acute” given the loss of 13.2% of the uniform water rate customer base and 24.7% of the uniform sewer rate customer base in this case.

The Commission also relied on the testimony of Fernald that CWSNC’s slow growth rate would likely mean that this adverse rate impact would persist for many years. At that time, CWSNC had experienced a net increase of only fifteen customers since June of 2006. Given the average rate increases for CWSNC’s remaining ratepayers of 5.8% (\$2.37) per month for water operations and 6.0% (\$2.41) per month for sewer operations, Fernald estimated that \$3.36 million would be required “to protect [the remaining ratepayers] from the adverse effects of the sale for a five-year period.” Though Lubertoizzi, witness for the Utility, testified that CWSNC “continued to seek to grow its customer base,” the Commission cited as evidence undercutting that aspiration his own acknowledgement that “the housing market has suffered significant downturns over the past five years, so organic customer growth has not been as robust as CWSNC would have hoped.” The Commission also pointed to Lubertoizzi’s concession on cross-examination that “the proposed transfer would cause diseconomies of scale [for CWSNC],” which would not be offset by cost reductions.

Based on that evidence, the Commission took pains to lay out specific distinguishing factors between this case and its previous decisions, all of which had assigned 100% of the gain on sale to shareholders since the Policy was first implemented on 7 September 1994. First, this was the only case in which the adverse impact on rates had been quantified.<sup>3</sup> Second, the evidence showed that the adverse

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3. The Commission noted, however, that it was in the process of deciding another case, Order Determining Regulatory Treatment of Gain on Sale in the Matter of the Application by Aqua North Carolina, Inc., Docket No. W-218, Subs 325, 327, and 319 (23 December 2011) [hereinafter *Aqua*], in which rates were also being quantified. In *Aqua*, the Commission eventually found that there was *not* overwhelming and compelling evidence to justify excepting the Policy—despite the fact that the adverse impact on rates was similarly quantified. That disparity is a part of the Appellants’ contention in Part II, *infra*.

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impact on remaining customers was, for the first time in seventeen years, likely to persist—due in part to CWSNC's lack of growth. Third, the transfer resulted in “extraordinarily large numbers of customers . . . subject to being transferred.”<sup>4</sup> Fourth, CWSNC sought to transfer fifteen additional utility systems above and beyond CMU's required annexation area. According to the Commission, CMU initially approached CWSNC about purchasing only nine subdivisions in what eventually came to be a twenty-four-subdivision agreement for transfer. “The remaining [fifteen] subdivisions were included in the purchase to accommodate [CWSNC]'s business plan.” Therefore, unlike past Commission-approved transfers, the Commission reasoned that “[CWSNC] faced no threat of being paralleled and losing [the Cabarrus Woods Systems] customers as a result.”<sup>5</sup> These four circumstances, taken together, were enough for the Commission to determine that there was overwhelming and compelling evidence sufficient to justify assigning a portion of the gain on sale to the ratepayers remaining with CWSNC.

As a consequence, the Commission determined that CWSNC was “not likely to offset the loss of the Cabarrus Woods Systems customers through growth anytime in the near future.” The Commission recognized “the policy trade-off this transfer creates” (*i.e.*, the fact that those individuals transferred to CMU would benefit from lower rates while those who stayed with CWSNC would experience even higher rates unless CWSNC were to grow enough to offset the loss of customers), but cited to CWSNC's lack of significant growth since 2006 and the “slow growth in the economy in general” for support.

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4. The deal would result in the transfer of 6,208 individuals (*i.e.*, 17.6% of CWSNC's customer base).

5. Chief engineer for CMU, Barry Shearin, has described the paralleling process as follows:

[If the agreement falls through, t]he City must . . . provide water and wastewater service to the areas that were annexed effective June 30, 2009. . . . CMU would need to install basic water and sewer systems in the annexed areas if it does not acquire [CWSNC's] systems.

. . . .

[I]t is more efficient and cost-effective for the City to acquire [CWSNC]'s facilities than to incur the unnecessary expense of duplicating facilities. . . . [I]t is not in the public interest for a city to have to expend limited public funds to construct duplicate facilities, when adequate facilities are already in place.

. . . .

The City would also be harmed because it has constructed major outfalls and reserved additional treatment capacity . . . [, and] the City would potentially end up with significant “stranded investment” if it is not able to purchase [CWSNC]'s systems . . . .

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Accordingly, the Commission found that “the proposed transfer would increase the cost of service for the ratepayers who would remain with [CWSNC] after the transfer,” resulting in “an explicit significant adverse impact,” and concluded that it was reasonable and appropriate to assign an estimated \$3.36 million to CWSNC’s remaining ratepayers.

CWSNC and CMU (“the Appellants”) argue that the Commission’s findings and conclusion are not based on competent evidence because the Commission has previously assigned 100% of the gain on sale to shareholders on a consistent basis for the past seventeen years. They contend that losses of economies of scale are the “inevitable consequence” of the preferable process of transferring systems to a municipality and cite to a previous decision by the Commission, which found that such losses “do not justify awarding a portion of the gain on sale to remaining ratepayers.” The Appellants also contest the Commission’s finding that CWSNC is unlikely to grow its customer base as “speculative, opinion testimony, which is incompetent evidence.” We are not persuaded.

While the Appellants provide valid reasons for why the Commission might not have chosen to allocate a portion of the gain on sale to ratepayers, they are not sufficient to show that the Commission’s decision was not based on competent, material, and substantial evidence. We presume a decision of the Commission to be just and reasonable. *See* N.C. Gen. Stat. § 62-94(e). Accordingly, our Supreme Court has held that the final decision of the Commission should be upheld as based on competent evidence even when it is based on evidence that is “somewhat skimpy” or “more like conclusions.” *See Thornburg I*, 314 N.C. at 515, 334 S.E.2d at 775 (holding that the Commission’s findings of fact were supported by the evidence and binding on appeal despite being “somewhat skimpy” and “more like conclusions”). Even if we disagree with the Commission’s rationale, we are not empowered to overturn its order when that order is based on competent evidence. *See Gen. Tel. Co. of Se.*, 281 N.C. at 336-37, 189 S.E.2d at 717.

Unlike *Thornburg I*, the evidence relied on by the Commission in this case is comprehensive, thorough, and well thought out. It is based on the testimony of witnesses for the Public Staff as well as the Utility and supported by precise data concerning the nature of the transfer. Thus, given the Commission’s allotted authority to determine the weight and sufficiency of the evidence, and after a thorough review of said evidence and its relation to the Commission’s findings,

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we hold that those findings are supported by competent, material, and substantial evidence, and that they justify the Commission's conclusion to allocate an estimated \$3.36 million of the gain on sale to CWSNC's remaining ratepayers.

## *II. Arbitrary and Capricious*

[2] "Decisions are arbitrary and capricious when, among other things, they indicate a lack of fair and careful consideration or fail to display a reasoned judgment." *Thornburg I*, 314 N.C. at 515, 334 S.E.2d at 776. If this Court merely disagrees with the Commission on factual or policy grounds, it may not substitute its judgment for that of the Commission. *See In re Utils., Inc.*, 147 N.C. App. 182, 187, 555 S.E.2d 333, 337 (2001) ("[T]he appellate court . . . may not substitute its judgment, either with respect to factual disputes or *policy disagreements*, for that of the Commission.") (emphasis added) (internal quotation marks and citation omitted).

### *A. Validity of the Policy*

The Appellants argue that the Commission's order should be overturned as arbitrary and capricious because the Policy and its exception are poorly defined. In support of that point, CMU characterizes the Policy as "fraught with uncertainty as it provides no objective standard for what evidence is required to make an exception to the Commission's gain on sale policy." CWSNC asserts that the Commission's decision was arbitrary and capricious because it "never articulated a standard that can be uniformly and fairly applied to transactions involving a gain on sale" and none of the Commission's orders define the term "overwhelming and compelling evidence." We are not persuaded.

This Court has already addressed the validity of the Policy. In *Public Staff I*, this Court addressed the Commission's first application of the Policy and determined that it was not arbitrary and capricious, but refrained from addressing the Policy's validity outside of that factual circumstance. *State ex rel. Utils. Comm'n v. Public Staff—N.C. Utils. Comm'n*, 123 N.C. App. 43, 51, 472 S.E.2d 193, 199 (1996) (stating that the Policy's future applicability was not properly before this Court) [hereinafter *Public Staff I*]. We affirmed that decision in *Public Staff II* and established that the Policy was valid in and of itself. *State ex. rel. Utils. Comm'n v. Public Staff—N.C. Utils. Comm'n*, 123 N.C. App. 623, 628, 473 S.E.2d 661, 665 (1996) [hereinafter *Public Staff II*]. In so holding, we reasoned that "enactment of

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the policy by the Commission within an adjudicative proceeding” was not “capricious, unreasonable, or arbitrary action or disregard of law” and, thus, was not an abuse of discretion. *Id.* at 627, 473 S.E.2d at 664.

In both cases, we thoroughly vetted the extent to which the Commission’s policy could be considered arbitrary and capricious and found that it was not, despite the Commission’s failure to more fully define the terms used therein. Accordingly, we apply those decisions and affirm the Commission’s use of the Policy here. *See In re Civil Penalty*, 324 N.C. 373, 384, 379 S.E.2d 30, 37 (1989) (“Where a panel of the Court of Appeals has decided the same issue, albeit in a different case, a subsequent panel of the same court is bound by that precedent, unless it has been overturned by a higher court.”).

#### *B. Application of the Policy*

[3] Alternatively, the Appellants argue that the Policy is arbitrary and capricious as applied, contending that the order in this case is not consistent with the Commission’s prior determinations on similar facts.<sup>6</sup> Most notably, the Appellants cite to the Commission’s opinion in *Aqua*, decided on the same day as this case. There the Commission assigned 100% of the gain on sale to the shareholders of the public water and sewer utility Aqua North Carolina, Inc. (“the Aqua utility”) under similar factual circumstances. Importantly, *Aqua* was at that time the only case other than this one in which the Commission had been able to quantify the adverse impact against ratepayers. In so doing, the Commission determined that the *Aqua* ratepayers would be subject to a \$1.96 increase in their monthly sewer bill as a result of the transfer. Appellants argue that the Commission’s disparate orders in this case and *Aqua* constitute an arbitrary and capricious application of the Policy. We disagree.

For the Commission’s order to be arbitrary and capricious, it must lack fair and careful consideration or fail to display a reasoned judgment. *Thornburg I*, 314 N.C. at 515, 334 S.E.2d at 776. Though the Commission’s opinions in *Aqua* and in this case share similarities, the two cases are based on different facts. The average rate increase for customers of the Aqua utility was 3% (or \$1.96) per month for sewer services. Water bills were not impacted. In this case, the average rate increase for CWSNC customers would be 5.8% (or \$2.37) per month

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6. We note that the past decisions of a previous panel of the North Carolina Utilities Commission are not binding on later panels of the Commission or this Court. *See State ex rel. Utils. Comm’n v. Thornburg*, 325 N.C. 463, 467, 385 S.E.2d 451, 453-54 (1989); *State ex rel. Utils. Comm’n v. Carolinas Comm. for Indus. Power Rates & Area Dev., Inc.*, 257 N.C. 560, 569-70, 126 S.E.2d 325, 333 (1962).

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for water services and 6% (or \$2.41) per month for sewer services. While the difference between these numbers may seem slight, they are consistently higher in this circumstance and apply to both water and sewer services, unlike in *Aqua*.

In addition, a larger number of people would be transferred in this case than *Aqua*. Here, approximately 6,208 customers would be transferred from CWSNC to CMU. This accounts for approximately 17.6% of the CWSNC sewer customers and approximately 13.2% of its water customers. In *Aqua*, only 910 customers were transferred. That accounted for approximately 7.06% of the Aqua utility's sewer customers. We also note that the Aqua utility has a policy disfavoring the loss of customers and, unlike CWSNC, the Commission characterized "[the Aqua utility's] business model [as] one of purchase, improvement, and long-term ownership and operation," clearly establishing it as "a growth company."

CWSNC has not established itself as a growth company. The Utility lost ratepayers from 2008 to 2009 and from 2009 to 2010, and its customer base has only experienced a "net increase" of fifteen ratepayers since its original peak in June of 2006. Further, CWSNC recently lost additional customers with the sale of the Corolla Light/Monterey Shores water system. While CWSNC argues that the Commission should not base its decision on mere speculation regarding CWSNC's ability to add customers in the future, the raw data show a persistent plateau effect, if not a downturn, in CWSNC's customers.<sup>7</sup>

The Commission's decision to rely on the data presented here is reasoned. Accordingly, we hold that the Commission's application of its Policy, even when compared with the Commission's decision in *Aqua*, was carefully considered, the result of reasoned judgment, and not arbitrary and capricious. Therefore, we affirm the order of the Commission and hold that it was not arbitrary and capricious as applied.

### III. Error of Law

[4] An error of law sufficient to overturn a decision of the Commission exists when the Commission exceeds its statutory authority in such a way that the substantial rights of the appellants are prejudiced. N.C. Gen. Stat. § 62-94(b); *see also State ex rel. Utils. Comm'n v. Public Staff—N.C. Utils. Comm'n*, 309 N.C. 195, 213, 306

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7. Under the theory of economies of scale, the more customers a utility is able to add, the more likely it is to be able to offset the negative effects of transferring away large groups of ratepayers.

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S.E.2d 435, 445 (1983) (“The Commission, in both of these cases, exceeded its statutory authority to the prejudice of the substantial rights of the ratepayers and thus the orders in both cases were affected by error of law.”).

CWSNC argues that the Commission committed an “error of law” by assigning a portion of the gain on sale to its ratepayers. In constructing that argument, the Utility characterizes the Commission’s assignment of \$3.36 million as a “subsidy” to remaining ratepayers and alleges that this subsidy constitutes reversible “error of law.” CWSNC justifies this quasi-syllogism by asserting that its customers from the Cabarrus Woods Systems, who would be transferred to the City if the deal proves successful, are “low-cost” customers and, thus, essentially provide a subsidy to CWSNC’s other, “high-cost” customers elsewhere. Therefore, CWSNC claims, the removal of the Cabarrus Woods Systems customers would mean that the remaining customers would simply have to pay the “actual cost” of their utilities. As such, any money allocated to the remaining customers from the gain on sale would constitute an improper “subsidy” in “blatant violation of cost of service legal principles, resulting in ratepayers paying rates that are lower than the actual cost of providing service.” We disagree.

CWSNC supports its argument by citing to an eighty-five-year-old opinion of the United States Supreme Court, which states that customers do not have an ownership interest in a company that provides a service to them and “[p]roperty paid for out of moneys received for service belongs to the company . . . .” The Utility characterizes this pronouncement as one component of certain overarching and ethereal “general ratemaking principles,” which are neither codified nor violable. Such a principle is not applicable here.

The Commission’s authority exists under chapter 62 of the North Carolina General Statutes, not “general ratemaking principles.” *See State ex rel. Comm’r of Ins. v. N.C. Rate Bureau*, 300 N.C. 381, 399, 269 S.E.2d 547, 561 (1980) (“The powers and authority of administrative officers and agencies are derived from, defined and limited by constitution, statute, or other legislative enactment.”). Chapter 62 empowers the Commission “to regulate public utilities generally, their rates, services and operations, and their expansion . . . .” N.C. Gen. Stat. § 62-2(b). The Commission is considered “an administrative board or agency of the General Assembly” and is empowered to promulgate rules and regulations and fix utility rates. N.C. Gen. Stat. § 62-23. By enacting chapter 62, our General Assembly conferred

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“broad powers to regulate public utilities and to compel their operation in accordance with the policy of the State . . . .” *Public Staff II*, 123 N.C. App. at 625, 473 S.E.2d at 663 (citation omitted).

Chapter 62, section 2 declares the policy of the State of North Carolina to be the fair regulation of public utilities in the interest of the public, just and reasonable rates and charges for public utility services without unjust discrimination, and, *inter alia*, the assurance that rates are set in a manner fair to utilities and customers. N.C. Gen. Stat. § 62-2(a). The allocation of a portion of the gain on sale falls within the auspices of that policy. Accordingly, we hold that the Commission did not exceed its statutory authority by allocating a portion of the gain on sale to ratepayers and, thus, committed no error of law.

#### IV. Constitutional Challenges

CWSNC argues that the Commission’s order violates Article I, section 19, of the North Carolina Constitution because (A) it arbitrarily and capriciously distinguished between CWSNC and the Aqua utility, without justification, and (B) it was confiscatory and constituted a taking without just compensation. Article I, section 19 of the North Carolina Constitution provides, in pertinent part: “No person shall be . . . deprived of his life, liberty, or property, but by the law of the land. No person shall be denied equal protection under the laws . . . .” N.C. Const. art. I, § 19.

##### A. Substantive Due Process and Equal Protection

[5] Public utilities are protected against disparate treatment under Article I, section 19, unless the government action at issue is rationally related to a legitimate government interest. *See Texfi Indus., Inc. v. City of Fayetteville*, 301 N.C. 1, 11, 269 S.E.2d 142, 149 (1980). CWSNC first argues that the Commission’s assignment of \$3.36 million of the gain on sale violated these provisions because it was (1) arbitrary and capricious in the context of the *Aqua* decision and (2) constituted disparate treatment without a rational basis. We disagree.

As we noted in section II(B), *supra*, the Commission’s order was based on reasoned decision making. Though the *Aqua* case is factually similar to this one, we determined that there were sufficient distinguishing factors to warrant the Commission’s allocation of a portion of the gain on sale. We find that reasoning persuasive in this context as well and hold that the Commission’s allocation of a portion of the gain on sale was not arbitrary and capricious under Article I, section 19.



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In addition, we are not persuaded by CWSNC's contention that its equal protection rights were violated. CWSNC contends that the Commission's order stemmed solely from the Commission's belief that, given the large size of the gain on sale in this case, the Utility "can afford it." We disagree. The purpose of assigning gain on sale to shareholders is to provide an incentive for utilities to sell water and sewer services to municipalities, which are typically better stewards of such services. In this case, as the Public Staff rightly noted, the Commission had determined that \$15.83 million was a sufficient incentive for CWSNC to make such a transfer, "especially given the risk that CMU could parallel their systems and deprive CWSNC of any gain on sale . . . ." We find this reasoning to be sensible and hold that the Commission's order is rooted in a rational, legitimate, government purpose. Accordingly, we affirm the Commission's order as neither arbitrary and capricious nor lacking a legitimate government purpose.

*B. Taking Without Just Compensation*

[6] Second, CWSNC asserts that the allocation of a portion of the gain on sale constituted a confiscation of property without just compensation in violation of Article I, section 19, of the North Carolina Constitution. CWSNC again characterizes the \$3.36 million portion of the gain on sale that was assigned to ratepayers by the Commission as a "subsidy" and argues that CWSNC held vested rights in the entire gain on sale because of its reliance during contracting on the Commission's longstanding policy against assigning anything less than 100% of the gain on sale to a utility's shareholders. That argument is not applicable here.

Our Supreme Court addressed a similar challenge in *State ex rel. Utils. Comm'n v. N.C. Nat. Gas Corp.*, 323 N.C. 630, 375 S.E.2d 147 (1989). In that case, a natural gas corporation argued that the Commission's order requiring that monies collected by the gas utility be allocated to certain customers amounted to an unlawful taking of property without due process. *Id.* at 631, 375 S.E.2d at 147. There our Supreme Court pointed out that "under the police power the state [sic] has authority to enact legislation to regulate the charges and business of a public utility." *Id.* at 643, 375 S.E.2d at 154 (internal quotation marks, brackets, and citation omitted). Recognizing that "[a]ny exercise by the State of its police power is, of course a deprivation of liberty," the Court looked to the degree of the reasonableness of the execution of that power when determining its constitutionality. *Id.* at 644, 375 S.E.2d at 155. Because an order of the Commission is legislative in nature, the Court subjected it to the same constitutional

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tests as other legislative enactments employing the police power. *Id.* Accordingly, the Supreme Court held that the Commission's actions were not an unconstitutional taking because the "benefit to the public outweighs any deprivation of [the utility's] constitutional rights." *Id.* at 645, 375 S.E.2d at 155. We apply that line of reasoning here.

As has been discussed, *supra*, the Commission is empowered by the legislature to regulate utilities and, with that, allocate a portion of the gain on sale to either the utility or its ratepayers. The Commission's decision to employ that power here, while contrary to the general rule established in its Policy, is not an unconstitutional taking. As discussed above, the Commission allocated \$3.36 million out of a \$19.2 million gain on sale to the ratepayers because of (1) the significant adverse impact on ratepayers, (2) the likely persistence of that adverse impact, (3) the large number of customers being lost, and (4) its determination that \$15.83 million was a sufficient incentive to live up to its policy goal of incentivizing the transfer of customers from utilities to municipalities.

At the outset, we note that "it is not and should not be this Court's role to determine the merits of policy positions adopted or rejected by the Commission." *Public Staff I*, 123 N.C. App. at 46, 472 S.E.2d at 196. However, to the extent that we must review the merits of the Commission's policy as an exercise of the Commission's police power under the North Carolina Constitution, we find that the benefit to the public realized by the Commission's exercise of its police power in assigning \$3.36 million of the gain on sale to ratepayers is not outweighed by any constitutional deprivation to CWSNC. We do not comment on the merits of the Commission's policy beyond that. Accordingly, we hold that the Commission did not violate Article I, section 19 of the North Carolina Constitution and affirm its 23 December 2011 order.

AFFIRMED.

Judges CALABRIA and ELMORE concur.

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[225 N.C. App. 137 (2013)]

STATE OF NORTH CAROLINA

v.

ROBERT THOMPSON BROOM

No. COA12-209

Filed 15 January 2013

**1. Homicide—death of child—mother shot while pregnant—child born alive—first-degree murder**

The trial court did not err by denying defendant's motion to dismiss the charge of first-degree murder where an infant died one month after her mother's shooting necessitated an early delivery. The precedent relied upon by defendant did not involve an infant born alive and, while the child was not directly injured by the shooting, there was expert medical testimony that the early delivery was required by the shooting and was a cause of the child's necrotizing enterocolitis, the direct cause of death.

**2. Homicide—premeditation and deliberation—shooting of pregnant woman—child born alive**

The trial court did not err by denying defendant's motion to dismiss the charge of first-degree murder where defendant challenged the evidence of premeditation and deliberation. Defendant's shooting of his pregnant wife led to the early delivery of the victim, who died after one month of life from complications of the early delivery. Defendant's statements and actions were sufficient to allow reasonable minds to conclude that he acted with premeditation and deliberation when he shot his wife.

**3. Appeal and Error—grounds for appeal—felony murder—no error in first-degree premeditated murder**

The issue of whether felony murder with kidnapping as the predicate felony should have been dismissed at trial was not reached where the appellate court concluded that there had been no error in the denial of defendant's motion to dismiss first-degree murder based on premeditation and deliberation.

**4. Appeal and Error—grounds for appeal—prayer for judgment continued—no final judgment**

An appeal from a kidnapping conviction was not reached where the trial court entered a prayer for judgment continued without imposing any conditions, so that there was no final judgment on the charge.

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**5. Homicide—attempted first-degree murder—intent to kill—substantial evidence**

When viewed in the light most favorable to the State, there was substantial evidence from which the jury could conclude that defendant shot his wife (Danna) with the specific intent to kill and the trial court did not err in denying defendant's motion to dismiss the charge of attempted first-degree murder. The State presented evidence that defendant removed Danna's cell phone from her reach, left the room, returned with a .45 caliber pistol, and shot her in the abdomen with a hollow point bullet. Defendant then denied Danna medical assistance for approximately twelve hours.

**6. Jury—selection—questioning limited—no abuse of discretion or prejudice**

There was no abuse of discretion or prejudice in a prosecution arising from the shooting of defendant's pregnant wife and the early delivery and subsequent death of the baby where the trial court limited defendant's voir dire questioning about when life begins and the death of a baby. The trial court sustained the State's objection to questioning that was confusing and not relevant.

**7. Jury—requested preselection instruction—denied—proper instruction given**

There was no abuse of discretion in the trial court's denial of defendant's request for a preselection jury instruction regarding the killing of an unborn child in a first-degree murder prosecution arising from the shooting of the child's mother. Defendant failed to include the requested instruction in the record; moreover, the trial court properly instructed the jury.

**8. Homicide—first-degree murder—request for instruction on second-degree murder—premeditation and deliberation not negated**

The trial court did not err by denying defendant's request for an instruction on second-degree murder where defendant did not provide evidence negating premeditation and deliberation other than his denial that he committed the offense.

**9. Constitutional Law—double jeopardy—prayer for judgment continued**

There was no double jeopardy violation for convictions of attempted first-degree murder and assault with a deadly weapon

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with intent to kill inflicting serious bodily injury where an unconditional prayer for judgment continued was entered on the latter conviction.

Appeal by defendant from judgments entered 13 October 2010 by Judge J.B. Allen, Jr. in Alamance County Superior Court. Heard in the Court of Appeals on 10 October 2012.

*Attorney General Roy Cooper, by Assistant Attorney General Daniel P. O'Brien, for the State.*

*Rudolf Widenhouse & Fialko, by M. Gordon Widenhouse, Jr., for defendant-appellant.*

HUNTER, Robert C., Judge.

Robert Thompson Broom (“defendant”) appeals from the judgments entered after the jury found him guilty of first-degree murder of his daughter, as well as the attempted first-degree murder and first-degree kidnapping of his wife, and assault with a deadly weapon with intent to kill inflicting serious injury on his wife. On appeal, defendant argues that the trial court erred in: denying his motion to dismiss the charges of first-degree murder, felony murder, kidnapping, and attempted first-degree murder; limiting his *voir dire* of prospective jurors; denying his request for a jury instruction prior to *voir dire* of prospective jurors; denying his request for an instruction on second-degree murder; and allowing the jury to return separate verdicts of attempted first-degree murder and assault with a deadly weapon with intent to kill inflicting serious injury for the same underlying actions. After careful review, we find no error.

**Background**

The State’s evidence tended to establish the following facts. Defendant and Danna Broom (“Danna”) married in 2001 and, in 2003, Danna gave birth to their first child. In May 2008, Danna learned that she was pregnant with the couple’s second child. By that time, however, defendant was having an extramarital affair and was considering leaving his wife. When Danna told defendant of her pregnancy, defendant became angry and suggested that Danna have an abortion. Danna refused to do so and told defendant he could “get out” if he insisted on her having an abortion. As their relationship continued to deteriorate, Danna explained to defendant that if he wanted a divorce she would do what was in the best interest of their children, which

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could include Danna's taking them to New York to live closer to her family.

On 3 October 2008, defendant asked Danna to stay home from work so that the couple could discuss their relationship. Danna was 27 weeks pregnant at the time. She agreed to not go to work, and she spent the day at home with defendant. At approximately 3:30 p.m., Danna and defendant were in their bedroom discussing their marriage and looking at old photographs. Over the course of the day, Danna had received several work-related emails on her cell phone. Defendant stated he wanted her to focus on their conversation, and he put Danna's phone on a nightstand out of Danna's reach. Shortly thereafter, defendant said, "I'll be right back. We're doing good. We're on the right path. Just stay here." Defendant exited the room and returned moments later. As defendant came towards Danna, she believed that defendant was going to give her a hug. She felt defendant's arms around her and, at that moment, Danna was shot in the abdomen with a .45 caliber hollow point bullet. After she fell back onto the bed, defendant told Danna that "he just couldn't take it anymore." She pleaded with defendant to call for help, but defendant refused to call 911; he collected all phones and kept them out of Danna's reach. After hours of pleading for help, Danna agreed to tell law enforcement and emergency personnel that the shooting was accidental in order to persuade defendant to call 911. Defendant called 911 at 3:11 a.m. At the hospital, Danna's doctors discovered that the gunshot had punctured her colon, spilling fecal matter into her abdomen. This necessitated a cesarean section in order to treat Danna's injuries and give her child the greatest chance of survival.

After the delivery, the child, Lillian Grace Broom, was put on a ventilator. Over the first four days of her life, Lillian was taken on and off of the ventilator, until 7 October when Lillian was able to breathe on her own. Over the next several weeks, Lillian opened her eyes, moved her limbs, fed, and gained weight. On 4 November 2008, however, Lillian presented symptoms of necrotizing enterocolitis ("NEC"), a condition in which the cells of the intestine die. Lillian's NEC caused her health to deteriorate rapidly. That evening, after the doctors realized there was nothing more they could do for her, Lillian was taken off the respirator and allowed to die in her mother's arms. Danna survived.

On 10 August 2009, defendant was indicted for first-degree murder for the unlawful, willful, and felonious killing of Lillian with malice aforethought in violation of N.C. Gen. Stat. § 14-17. As to crimes

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against Danna, defendant was indicted for attempted first-degree murder, first-degree kidnapping, and assault with a deadly weapon with intent to kill inflicting serious injury. The charges were joined for trial. A jury trial was held during the 27 September 2010 Criminal Session of the Superior Court for Alamance County, Judge J.B. Allen, Jr. presiding. The jury found defendant guilty of first-degree murder of Lillian on the basis of premeditation and deliberation and on the basis of felony murder. The jury also returned guilty verdicts for the charges of attempted first-degree murder of Danna, as well as first-degree kidnapping, and assault with a deadly weapon with intent to kill inflicting serious injury. The trial court sentenced defendant to life imprisonment without parole for first-degree murder and 157 to 198 months for attempted first-degree murder. The trial court entered a prayer for judgment continued on the convictions for first-degree kidnapping and assault with a deadly weapon with intent to kill inflicting serious injury. Defendant gave oral notice of appeal in open court.

**Discussion****A. First-Degree Murder**

Defendant makes multiple arguments to contend that the trial court erred in denying his motion to dismiss the charge of first-degree murder based on premeditation and deliberation. First, defendant contends that Lillian cannot be the subject of a first-degree murder charge because she had not been born at the time Danna was shot. Second, defendant argues that Lillian's death was not caused by the gunshot wound to Danna. Third, defendant claims that the State failed to show substantial evidence of premeditation and deliberation. We disagree.

We review the trial court's denial of a motion to dismiss *de novo*. *State v. Smith*, 186 N.C. App. 57, 62, 650 S.E.2d 29, 33 (2007). In doing so, we must determine "whether there is substantial evidence (1) of each essential element of the offense charged, or of a lesser offense included therein, and (2) of defendant's being the perpetrator of such offense." *State v. Fritsch*, 351 N.C. 373, 378, 526 S.E.2d 451, 455 (quoting *State v. Barnes*, 334 N.C. 67, 75, 430 S.E.2d 914, 918 (1993)), *cert. denied*, 531 U.S. 890, 148 L. Ed. 2d 150 (2000). Substantial evidence is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *State v. Smith*, 300 N.C. 71, 78-79, 265 S.E.2d 164, 169 (1980). When considering defendant's motion to dismiss, "the trial court must consider all evidence admitted, whether

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competent or incompetent, in the light most favorable to the State, giving the State the benefit of every reasonable inference and resolving any contradictions in its favor.” *State v. Rose*, 339 N.C. 172, 192, 451 S.E.2d 211, 223 (1994), *cert. denied*, 515 U.S. 1135, 132 L. Ed. 2d 818 (1995).

[1] In support of his argument that Lillian was not the proper subject of a homicide offense, defendant relies on *State v. Beale*, 324 N.C. 87, 376 S.E.2d 1 (1989). In *Beale*, the defendant was charged with the felonious murder of “a viable but unborn child” with malice aforethought in violation of N.C. Gen. Stat. § 14-17. *Id.* at 88, 376 S.E.2d at 1. The *Beale* Court concluded that the defendant could not be prosecuted for the killing of a viable but unborn child under section 14-17, as the statute then existed. *Id.* at 93, 376 S.E.2d at 4. Despite the amendments to N.C. Gen. Stat. § 14-17 that have been enacted since that decision, the provisions of the statute relevant to *Beale* and this case remain substantively unchanged.<sup>1</sup> Thus, defendant insists that *Beale* is controlling and precludes his conviction for first-degree murder of Lillian based on premeditation and deliberation. Yet, *Beale* is readily distinguishable as the case involved the death of an unborn child. The evidence here established that Lillian was born alive and lived for one month before dying. Thus, the holding of *Beale* as it pertains to the killing of an unborn child affords defendant no relief.

Alternatively, defendant contends that the common law definition of murder as recognized by *Beale* does not support his prosecution for first-degree murder. In reaching its holding in *Beale*, the Supreme Court recognized that murder under section 14-17 is murder as defined by the common law, *id.* at 89, 376 S.E.2d at 2, and under the common law “the killing of a fetus is not criminal homicide unless it was born alive and subsequently died of *injuries inflicted prior to birth*.” *Id.* at 92, 376 S.E.2d at 4 (emphasis added). Despite the legislature’s amendments to section 14-17 since its original enactment, the Court discerned no intent by the legislature to provide for any change to this common law rule. *Id.* at 93, 376 S.E.2d at 4.<sup>2</sup> Defendant there-

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1. N.C. Gen. Stat. § 14-17 (2011) states, in pertinent part: “A murder which shall be perpetrated by means of a nuclear, biological, or chemical weapon of mass destruction as defined in G.S. 14-288.21, poison, lying in wait, imprisonment, starving, torture, or by any other kind of willful, deliberate, and premeditated killing, or which shall be committed in the perpetration or attempted perpetration of any arson, rape or a sex offense, robbery, kidnapping, burglary, or other felony committed or attempted with the use of a deadly weapon shall be deemed to be murder in the first degree[.]”

2. We note that in 2011, the legislature enacted N.C. Gen. Stat. § 14-23.2 (2011), which provides for the criminal offense of murder of an unborn child and applies only to offenses committed on or after 1 December 2011. *See* 2011 N.C. Sess. Laws ch. 60, § 8.



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fore argues that the common law definition of murder is inapplicable here as Lillian did not die of “injuries inflicted prior to birth[.]” *id.* at 92, 376 S.E.2d at 4. We cannot agree. While the record supports defendant’s contention that the bullet did not strike the fetus, his insistence that the emergency cesarean section was performed solely for the safety of Danna is clearly contradicted by the record, and the record supports the conclusion that defendant’s shooting of Danna started a foreseeable chain of events that led to Lillian’s death.

The State presented the testimony of several medical experts that Danna’s gunshot wound necessitated Lillian’s early delivery, that the early delivery was a cause of Lillian’s NEC, and that NEC resulted in Lillian’s death. Dr. Chad Grotegut testified as an expert in maternal/fetal medicine that as a result of the shooting Danna sustained a rupture to her colon that spilled fecal matter into her abdomen. This not only placed Danna’s life in danger but placed the fetus at a “high risk for developing a severe infection” and necessitated an emergency delivery. Dr. Robert Lenfestey and Dr. Susan Izatt both testified that in their professional opinions Lillian’s medical problems were caused by her prematurity and that there were no indications that Lillian would have been born premature had it not been for her mother’s gunshot wound. Dr. Margarita Bidegain testified that while babies carried to full term can develop NEC, such cases are “extremely rare,” and that a baby’s prematurity “is the only cause [doctors] know” for the infection. Viewed in the light most favorable to the State, we conclude this evidence was sufficient to permit a jury to conclude that by shooting Danna, defendant caused Lillian’s premature delivery, which contributed to her developing NEC, the ultimate cause of Lillian’s death. Thus, the jury could reasonably conclude that defendant was *a cause* of Lillian’s death. Indeed, defendant conceded causation in his oral argument before this Court. Furthermore, defendant’s criminal act need not have been the only cause of Lillian’s death; to establish causation, it is sufficient that defendant’s criminal act was a foreseeable cause of Lillian’s death. *See State v. Jones*, 290 N.C. 292, 298, 225 S.E.2d 549, 552 (1976) (“To warrant a conviction for homicide the State must establish that the act of the accused was *a proximate cause* of the death. . . . [T]he act of the accused *need not be the immediate cause* of the death. He is legally accountable if the direct cause is a natural result of his criminal act.” (emphasis added) (citations omitted)).

[2] The State also provided sufficient evidence that defendant acted with premeditation and deliberation. Defendant was uninterested in having a second child and asked Danna to get an abortion. He told

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friends that “one [child] was enough” and that he did not want any more children. Defendant was involved in a long-term extramarital affair with a woman who testified that defendant “counted down the years, months, days, seconds until [his first child] would go to college, so that he could leave.” Defendant had made plans to move out of his martial home into a separate apartment, but reacted angrily when Danna suggested that if the couple divorced she might move out of the state and take the children with her. There was also evidence that shortly before defendant shot Danna, defendant took Danna’s cell phone and placed it out of her reach. This evidence was sufficient to allow reasonable minds to conclude that defendant acted with premeditation and deliberation when he shot Danna. Because the State offered substantial evidence on each of the essential elements of first-degree murder and that defendant was the perpetrator of the offense, the trial court did not err in denying defendant’s motion to dismiss the charge.

**B. Felony Murder**

[3] Defendant also argues that the trial court erred in denying defendant’s motion to dismiss the charge of felony murder where the kidnapping of Danna was the predicate felony. As we have concluded that the trial court did not err in denying defendant’s motion to dismiss the charge of first-degree murder based on premeditation and deliberation, we do not reach this issue. *See State v. Britt*, 132 N.C. App. 173, 178, 510 S.E.2d 683, 687 (“We need not reach defendant’s argument regarding the felony murder rule, because defendant’s conviction predicated on the theory of murder with premeditation and deliberation was without error.”), *disc. review denied*, 350 N.C. 838, 538 S.E.2d 571 (1999).

**C. Kidnapping**

[4] Defendant argues that the trial court erred in denying his motion to dismiss the charge of kidnapping. However, where the trial court enters a prayer for judgment continued there is no final judgment from which to appeal. *See State v. Pledger*, 257 N.C. 634, 638, 127 S.E.2d 337, 340 (1962) (“Where prayer for judgment is continued and no conditions are imposed, there is no judgment, [and] no appeal will lie[.]”). As the trial court entered a prayer for judgment continued on defendant’s conviction for first-degree kidnapping without imposing any conditions, there is no final judgment on this charge, and we do not reach this issue.

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**D. Attempted First-Degree Murder**

[5] Defendant argues that the trial court erred in denying his motion to dismiss the charge of attempted first-degree murder of Danna because the evidence raised only a suspicion of specific intent to kill. We disagree.

To commit the crime of attempted first-degree murder, a defendant must act with the specific intent to kill. *State v. Edwards*, 174 N.C. App. 490, 497, 621 S.E.2d 333, 338 (2005). To establish specific intent to kill Danna, the State was required to show not only that defendant acted intentionally in shooting his wife, but did so with the intention that the shooting result in her death. *See id.* (citing *State v. Keel*, 333 N.C. 52, 58, 423 S.E.2d 458, 462 (1992)). Intent to kill is a mental state that ordinarily can only be proven by circumstantial evidence including the “nature of the assault, the manner in which it was made, the weapon, if any, used, and the surrounding circumstances . . . .” *Id.* The State presented evidence that defendant removed Danna’s cell phone from her reach, left the room, returned with a .45 caliber pistol, and shot her in the abdomen with a hollow point bullet. Defendant then denied Danna medical assistance for approximately twelve hours. When viewed in the light most favorable to the State, we conclude there was substantial evidence from which the jury could conclude that defendant shot Danna with the specific intent to kill. *See Smith*, 300 N.C. at 78-79, 265 S.E.2d at 169 (stating that the substantial evidence required to survive a defendant’s motion to dismiss is “such relevant evidence as a reasonable mind might accept as adequate to support a conclusion”). Therefore, the trial court did not err in denying defendant’s motion to dismiss the charge of attempted first-degree murder.

**E. Voir Dire**

[6] Defendant argues that the trial court erred in limiting his *voir dire* of prospective jurors and in denying his request to be provided, prior to *voir dire*, the jury instruction the trial court intended to use when instructing the jury on the law regarding the killing of an unborn fetus. These limitations, defendant contends, denied him the opportunity to intelligently exercise his peremptory challenges and secure an impartial jury.

Defendant argues that the alleged errors in the jury selection process were structural errors and are reversible *per se*. *See State v. Garcia*, 358 N.C. 382, 409, 597 S.E.2d 724, 744 (2004) (noting that structural error is a “rare form of constitutional error” resulting from

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a defect in the trial process that necessarily renders a trial fundamentally unfair), *cert. denied*, 543 U.S. 1156, 161 L. Ed. 2d 122 (2005). The errors alleged by defendant, however, are not the types of errors recognized by our Courts as structural errors. *See id.* at 409-10, 597 S.E.2d at 744-45 (identifying the six categories of structural errors recognized by the United States Supreme Court and noting that the Supreme Court of North Carolina has declined to expand those categories). Rather, defendant “must show prejudice, as well as clear abuse of discretion, to establish reversible error” in the trial court’s limitations on his *voir dire* of prospective jurors. *State v. Syriani*, 333 N.C. 350, 372, 428 S.E.2d 118, 129, *cert. denied*, 510 U.S. 948, 126 L. Ed. 2d 341 (1993).

We conclude defendant has failed to show abuse of discretion or prejudice. During jury selection, defense counsel attempted to ask prospective jurors about their views on abortion and when life begins, and whether the jurors held such strong views on the subjects that they would be unable to apply the law. The trial court sustained the State’s objection to the line of questioning, and defendant’s counsel then rephrased the question to ask if the jurors held strong views about “the death of a baby, because that’s what happened in this case.” These questions apparently confused prospective jurors as several inquired about the relevancy of their opinions on abortion. As one prospective juror put it, “You’re saying one thing and you’re kind of going somewhere else with this out in right field.”

The trial judge then informed the prospective jurors, that because the evidence had not been introduced, he did not know the instructions he would give them, but it was their duty to apply the law as provided to them, not as they might like the law to be. All prospective jurors agreed they could apply the law as it was provided to them by the court. We conclude the trial court did not abuse its discretion when it sustained the State’s objection to questioning that was confusing and not relevant to the trial. *See State v. Vinson*, 287 N.C. 326, 336, 215 S.E.2d 60, 68 (1975), *death sentence vacated*, 428 U.S. 902, 49 L. Ed. 2d 1206 (1976) (stating that “hypothetical questions so phrased as to be ambiguous and confusing . . . are improper and should not be allowed”). Nor was defendant prejudiced by the trial court’s limitation on his questioning of prospective jurors regarding their views on abortion and when life begins in a case involving the death of a child who was born alive; the questions were not necessary to defense counsel’s determination of how to intelligently exercise defendant’s peremptory challenges.

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[7] Similarly, we conclude the trial court did not err in denying defendant's request for an instruction on the law regarding the killing of an unborn child. In *State v. Conaway*, 339 N.C. 487, 507, 453 S.E.2d 824, 837, *cert. denied*, 516 U.S. 884, 133 L. Ed. 2d 153 (1995), the defendant made a similar argument that the trial court erred in denying his request for a preselection instruction intended to "clarify the law" before he questioned prospective jurors. In rejecting this argument, our Supreme Court noted that the trial court's instructions were substantively similar to the defendant's requested instruction, and, ultimately, the trial court properly instructed the jury on the law. *Id.* at 508, 453 S.E.2d at 838. Here, defendant has failed to include the requested instruction in the record. Ultimately, however, the trial court properly instructed the jury that "a fetus that is borned [sic] alive and subsequently dies of injuries inflicted prior to the birth is a human being" for the purpose of the crime of first-degree murder. We discern no abuse of discretion in the trial court's denial of defendant's request for a preselection jury instruction regarding the killing of an unborn child, and defendant's argument is overruled.

**F. Request for Jury Instruction on Second-Degree Murder**

[8] Defendant next argues that the trial court erred in denying his request for an instruction on second-degree murder. Defendant contends that the evidence did not give rise to a reasonable inference that defendant acted with premeditation and deliberation to kill Lillian. We disagree.

The trial court must give a jury instruction on a lesser-included offense "only if the evidence would permit the jury rationally to find defendant guilty of the lesser offense and to acquit him of the greater." *State v. Millsaps*, 356 N.C. 556, 561, 572 S.E.2d 767, 771 (2002). We review *de novo* the trial court's decision on whether to instruct the jury on a lesser-included offense. *State v. Debiase*, \_\_\_ N.C. App. \_\_\_, \_\_\_, 711 S.E.2d 436, 441, *disc. review denied*, 365 N.C. 335, 717 S.E.2d 399 (2011). "In determining whether the evidence is sufficient to support the submission of the issue of a defendant's guilt of a lesser included offense to the jury, 'courts must consider the evidence in the light most favorable to [the] defendant.'" *Id.* (quoting *State v. Clegg*, 142 N.C. App. 35, 46, 542 S.E.2d 269, 277, *disc. review denied*, 353 N.C. 453, 548 S.E.2d 529 (2001)). However, the trial court does not err in not instructing the jury on second-degree murder as a lesser included offense of first-degree murder " '[i]f the evidence is sufficient to fully satisfy the State's burden of proving each and every

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element of the offense of murder in the first degree, including premeditation and deliberation, and there is no evidence to negate these elements other than defendant's denial that he committed the offense[.]' " *State v. Locklear*, 363 N.C. 438, 454-55, 681 S.E.2d 293, 306 (2009) (quoting *State v. Strickland*, 307 N.C. 274, 293, 298 S.E.2d 645, 658 (1983), *overruled in part on other grounds by State v. Johnson*, 317 N.C. 193, 344 S.E.2d 775 (1986)).

Premeditation means that the defendant's act "was thought out beforehand for some length of time, however short . . . . Deliberation means an intent to kill, carried out in a cool state of blood . . . to accomplish an unlawful purpose and not under the influence of a violent passion[.]" *State v. Lane*, 328 N.C. 598, 608-09, 403 S.E.2d 267, 274, *cert. denied*, 502 U.S. 915, 116 L. Ed. 2d 261 (1991). Premeditation and deliberation are frequently proven through circumstantial evidence, such as lack of provocation on the part of the deceased, the "conduct and statements of defendant before and after the killing," ill-will between the parties, and "evidence that the killing was done in a brutal manner." *Id.* at 609, 403 S.E.2d at 274 (citation and quotation marks omitted).

Here, the State offered substantial evidence to support the jury's finding of premeditation and deliberation in the murder of Lillian. The State's evidence tended to show that defendant did not want a second child. Immediately before defendant shot his pregnant wife, defendant placed her cell phone out of her reach, and briefly left the room. Upon his return, defendant came towards Danna, shot her in her abdomen with a hollow point bullet using a .45 caliber pistol, and refused to call for medical assistance for approximately twelve hours. In his defense, defendant insisted that Danna shot herself. Because defendant did not provide evidence negating premeditation and deliberation other than his denial that he committed the offense, defendant was not entitled to an instruction on second-degree murder. *See State v. Smith*, 351 N.C. 251, 268, 524 S.E.2d 28, 40 (citing *Strickland*, 307 N.C. at 293, 298 S.E.2d at 657-58, and concluding the defendant was not entitled to an instruction on a lesser included offense of involuntary manslaughter where evidence supported each element of first-degree murder "and there was no other evidence to negate these elements other than defendant's denial that he committed the offense"), *cert. denied*, 531 U.S. 862, 148 L. Ed. 2d 100 (2000).

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**G. Double Jeopardy**

[9] Lastly, defendant argues that the trial court erred in allowing the jury to return guilty verdicts of attempted first-degree murder and assault with a deadly weapon with intent to kill inflicting serious bodily injury because the crimes were based on “precisely the same conduct.” However, the trial court entered a prayer for judgment continued on defendant’s conviction of assault with a deadly weapon with intent to kill inflicting serious bodily injury and did not impose any conditions upon defendant in so doing. Consequently, there is there is no final judgment on this conviction from which defendant may appeal. *Pledger*, 257 N.C. at 638, 127 S.E.2d at 340. Therefore, we do not reach this issue.

**Conclusion**

In sum, the trial court did not err in denying defendant’s motions to dismiss the charges of first-degree murder or attempted first-degree murder, in refusing to instruct the jury on second-degree murder, in limiting defendant’s *voir dire* of prospective jurors, or in denying defendant’s request for a preselection jury instruction. Because we find no error regarding defendant’s conviction for first-degree murder based on premeditation and deliberation, we do not reach the issue of whether the trial court erred in denying defendant’s motion to dismiss the charge based on the felony murder rule. We do not reach defendant’s argument regarding the trial court’s denial of defendant’s motion to dismiss the charge of first-degree kidnapping and the charge of assault with a deadly weapon inflicting serious injury as no final judgments were entered related to these charges. Accordingly, we find no error.

No Error.

Judges CALABRIA and ROBERT N. HUNTER, JR. concur.

**STATE v. CLAXTON**

[225 N.C. App. 150 (2013)]

STATE OF NORTH CAROLINA

v.

ERNESTO CLAXTON

No. COA12-556

Filed 15 January 2013

**1. Sentencing—prior record level—calculation—New York records—preponderance of evidence**

The trial court did not err in a felonious breaking and entering, felonious larceny after breaking and entering, and felony possession of burglary tools case by using the New York Department of Criminal Investigation records to calculate defendant's prior record level even though defendant alleged there were inconsistencies. Since the State was only required to prove defendant's prior convictions by a preponderance of evidence, the State met its burden.

**2. Sentencing—prior New York drug convictions—substantially similar to North Carolina Class G felonies**

The trial court did not err in a felonious breaking and entering, felonious larceny after breaking and entering, and felony possession of burglary tools case by determining that two of defendant's prior New York drug convictions were substantially similar to North Carolina Class G felonies. The relevant New York and North Carolina drug schedules substantially overlapped.

Appeal by defendant from judgment entered 12 October 2011 by Judge Laura A. Bridges in Mecklenburg County Superior Court. Heard in the Court of Appeals 10 October 2012.

*Attorney General Roy Cooper, by Assistant Attorney General Mary S. Mercer, for the State.*

*Harrington, Gilleland, Winstead, Feindel & Lucas, LLP, by Anna S. Lucas, for Defendant-appellant.*

HUNTER, JR., Robert N., Judge.

Ernesto Claxton ("Defendant") appeals a final judgment entered after a jury convicted him of: (i) felonious breaking and entering; (ii) felonious larceny after breaking and entering; and (iii) felony possession of burglary tools. Defendant contends the trial court erred by: (i) sentencing him as a Level V offender despite inconsistencies in the



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records of his prior out-of-state convictions and (ii) determining two of the prior out-of-state convictions were “substantially similar” to North Carolina Class G felonies. Upon review, we affirm.

**I. Facts & Procedural History**

Defendant was indicted on 28 March 2011 for: (i) felonious breaking and entering (N.C. Gen. Stat. § 14-54(a) (2011)); (ii) larceny after breaking and entering (N.C. Gen. Stat. § 14-72(b)(2) (2011)); (iii) possession of implements of housebreaking (N.C. Gen. Stat. § 14-55 (2011)); (iv) felonious possession of stolen goods (N.C. Gen. Stat. § 14-71.1 (2011)); and (v) having attained habitual felon status (N.C. Gen. Stat. § 14-7.1 (2011)). The State’s evidence tended to show the following facts.

On the night of 29 October 2010, Donald Wayne Costner, Jr. (“Costner”), was working as a security guard for an apartment complex construction site in Charlotte. Around 10:50 pm, Costner saw a flashlight shining in an unfinished building. He also heard a noise that “sounded like metal pipes on concrete being kicked.” Costner approached the building, called 911, and then observed Defendant walk out of the building carrying two sinks. Costner drew his gun, handcuffed Defendant, and held him until police arrived. Charlotte-Mecklenburg Police Department Patrol Officer David Georgian subsequently arrived and arrested Defendant for burglary.

Defendant’s trial occurred during the 10 October 2011 Criminal Session of the Mecklenburg County Superior Court. Defendant pled not guilty to all charges. The jury found Defendant guilty of (i) felonious breaking and entering; (ii) felonious larceny pursuant to breaking and entering; and (iii) possession of burglary tools. It found Defendant not guilty of (i) felonious possession of stolen goods and (ii) attaining habitual felon status.

At the 12 October 2011 sentencing hearing, the State presented the trial court with North Carolina and New York Department of Criminal Investigation (“DCI”) records of Defendant’s prior criminal convictions.

The North Carolina DCI Record (“NC DCI Record”) described Defendant as follows:

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Name: CLAXTON, ERNESTO RICARDO

...

FBI Number: 162769P9  
 Black/Male  
 Date of Birth: 09-14-1958  
 Birth Place: NY

...

Height: 6 Ft. 02 In.  
 Weight: 175 Lbs.  
 Eyes: BROWN  
 Hair Color: BLACK

The New York DCI Record ("NY DCI Record") provided slightly different information:

Subject Name(s) CLAXTON, ERNEST R  
 CLASTON, ERNEST  
 CIAXTON, ERNEST  
 CLAYTON, ERNEST R  
 CHAXTON, ERNEST

...

FBI Number 162769P9

...

Sex Male  
 Race Black  
 Asian

...

Height 5'10"  
 Weight 175  
 Date of Birth 1958-09-14  
 1956-09-14  
 1948-09-14  
 1958-09-04  
 1958-09-15  
 Hair Color Black  
 Eye Color Brown

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Place of Birth	New York
	Unknown
	Dominican Republic
	Dominica
	Denmark
Ethnicity	Hispanic or Latino

The trial court found “the [NY] DCI record [was] a competent record” to determine his prior record level for sentencing. The NY DCI Record listed 16 prior convictions, including, *inter alia*, felony convictions for (i) “Criminal Sale Controlled Substance-3rd: Narcotic Drug (220.39 [])” (“Third Degree Drug Sale”), and (ii) “Criminal Sale Controlled Substance-5th degree (220.31[])” (“Fifth Degree Drug Sale”). *See* N.Y. Penal Law §§ 220.39, 220.31 (2012). The NC DCI Record listed one prior Driving While Impaired conviction.

The State argued the New York convictions for Third Degree Drug Sale and Fifth Degree Drug Sale were “substantially similar” to North Carolina Class G felonies under N.C. Gen. Stat. § 90-95 (2011). It provided the trial court with the relevant New York and North Carolina statutes. At several points, the District Attorney contended the two New York drug convictions were for sale of heroin. After examining the statutes, the trial court determined Defendant’s two New York drug offenses were “substantially similar” to North Carolina Class G felonies for sentencing purposes. Based on these records, the trial court assigned Defendant 17 Prior Record Level points, making him a Level V offender.

In accordance with sentencing guidelines, the court sentenced Defendant to two sentences of a minimum of 15 months and a maximum of 18 months to run consecutively for (i) felonious breaking and entering and (ii) felonious larceny after breaking and entering. The court also sentenced Defendant to 9 to 11 months to run concurrently for possession of burglary tools. Defendant gave timely notice of appeal.

**II. Jurisdiction & Standard of Review**

This Court has jurisdiction to hear the instant case pursuant to N.C. Gen. Stat. § 7A-27(b) (2011). “When a defendant assigns error to the sentence imposed by the trial court, our standard of review is ‘whether [the] sentence is supported by evidence introduced at the trial and sentencing hearing.’” *State v. Deese*, 127 N.C. App. 536, 540, 491 S.E.2d 682, 685 (1997) (quoting N.C. Gen. Stat. § 15A-1444(a1))

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(Cum. Supp. 1996) (alteration in original)). “The State bears the burden of proving, by a preponderance of the evidence, that a prior conviction exists and that the offender before the court is the same person as the offender named in the prior conviction.” N.C. Gen. Stat. § 15A-1340.14(f) (2011).

“[W]hether an out-of-state offense is substantially similar to a North Carolina offense is a question of law that must be determined by the trial court.” *State v. Hanton*, 175 N.C. App. 250, 254, 623 S.E.2d 600, 604 (2006). We review questions of law *de novo*. *State v. Harris*, 198 N.C. App. 371, 377, 679 S.E.2d 464, 468 (2009). “ ‘Under a *de novo* review, the court considers the matter anew and freely substitutes its own judgment’ for that of the lower tribunal.” *State v. Williams*, 362 N.C. 628, 632-33, 669 S.E.2d 290, 294 (2008) (quoting *In re Greens of Pine Glen Ltd.*, 356 N.C. 642, 647, 576 S.E.2d 316, 319 (2003)).

If the State proves by the preponderance of the evidence that an offense classified as either a misdemeanor or a felony in the other jurisdiction is substantially similar to an offense in North Carolina that is classified as a Class I felony or higher, the conviction is treated as that class of felony for assigning prior record level points.

N.C. Gen. Stat. § 15A-1340.14(e) (2011)

**III. Analysis**

Defendant makes two arguments on appeal: (1) the trial court erred in sentencing him as a Level V offender when there were inconsistencies in his NY and NC DCI Records; and (2) the trial court erred in determining two of his prior New York drug convictions were “substantially similar” to North Carolina Class G felonies. Upon review, we affirm the trial court’s decisions.

**A. Inconsistencies in DCI Records**

[1] Defendant first contends the trial court erred by using the NY DCI Record to calculate his prior record level. Specifically, he argues the State did not meet its burden of proving Defendant’s prior out-of-state convictions due to inconsistencies in the NC and NY DCI Records. We disagree.

According to N.C. Gen. Stat. § 15A-1340.14(f), prior convictions can be proven by:

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- (1) Stipulation of the parties.
- (2) An original or copy of the court record of the prior conviction.
- (3) A copy of records maintained by the Division of Criminal Information, the Division of Motor Vehicles, or of the Administrative Office of the Courts.
- (4) Any other method found by the court to be reliable.

N.C. Gen. Stat. § 15A-1340.14(f) (2011). Documents listed under subsections (2) and (3) of this statute are “prima facie evidence that the offender named is the same person as the offender before the court, and that the facts set out in the record are true.” *Id.*

For DCI records, “minor clerical errors, . . . standing alone, do not render the evidence incompetent.” *State v. Safrit*, 154 N.C. App. 727, 730, 572 S.E.2d 863, 866 (2002). In *Safrit*, the State offered court records and a DCI record to determine the defendant’s prior record level. *Id.* at 729, 572 S.E.2d at 866. The defendant argued the evidence was insufficient because the documents “erroneously stated an incorrect disposition date and incorrectly identified defendant as ‘Howard Safriet, W, M.’ instead of ‘Howard Safrit.’ ” *Id.* This Court held these “minor clerical errors” did not render the documents insufficient as evidence of prior out-of-state convictions. *See id.* at 730, 572 S.E.2d at 866. The documents’ sufficiency was further supported by the fact that they contained identical social security numbers and driver’s license numbers. *See id.*

Additionally, DCI records containing a “detailed description of defendant including his fingerprint identifier number and FBI number” have “sufficient identifying information with respect to defendant to give it the indicia of reliability.” *State v. Rich*, 130 N.C. App. 113, 116, 502 S.E.2d 49, 51 (1998).

In the present case, Defendant contends the NY DCI Record is not sufficient evidence of his prior out-of-state conviction due to inconsistencies with the NC DCI Record. The trial court found the State met its evidentiary burden. We agree with the trial court’s determination.

Like the discrepancies in *Safrit*, the inconsistencies of the DCI Records in this case are simply “minor clerical errors.” *See Safrit*, 154 N.C. App. at 730, 572 S.E.2d at 866. Here, the trial court was presented with DCI Records from North Carolina and New York. The documents are dissimilar in the following particulars. First, the NC DCI Record

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lists Defendant's name as "Ernesto Ricardo Claxton," while the NY DCI Record provides five names: "Ernest R Claxton," "Ernest Claston," "Ernest Ciaxton," "Ernest R Clayton," and "Ernest Chaxton." Second, the NC DCI Record describes Defendant's race as "Black," but the NY DCI Record lists his race as both "Black" and "Asian" and his ethnicity as "Hispanic or Latino." Third, the NC DCI Record provides a birth date of 14 September 1958, while the NY DCI Record provides five possible birthdates: 14 September 1958, 14 September 1956, 14 September 1948, 4 September 1958, and 15 September 1958. Fourth, although the NC DCI Record lists Defendant's birthplace as New York, the NY DCI Record lists five possibilities: "New York," "Unknown," "Dominican Republic," "Dominica," and "Denmark." Lastly, the NC DCI Record describes Defendant's height as six feet, two inches, while the NY DCI Record gives a height of five feet, ten inches.

Nonetheless, the NC and NY DCI Records still have numerous similarities. *See id.* at 730, 572 S.E.2d at 866. First, the Records list identical weights, eye colors, hair colors, and FBI numbers. As we held in *Rich*, DCI records with identical FBI numbers have an "indicia of reliability." *See Rich*, 130 N.C. App. at 116, 502 S.E.2d at 51. Second, even though the spelling of the names in the two DCI Records vary slightly, they are substantially similar. Third, although the NY DCI Record provides five birthdates and birth locations, it lists the birthdate (14 September 1958) and birth location (New York) provided in the NC DCI Record.

Consequently, since the burden of the State is only to produce a preponderance of evidence of Defendant's prior convictions, we conclude the State has met its burden here. Thus, the trial court did not err in using the NY DCI Record to determine Defendant's prior record level.

**B. Substantially Similar Offenses**

[2] Defendant next argues the trial court committed prejudicial error in determining his prior New York convictions for (i) Third Degree Drug Sale and (ii) Fifth Degree Drug Sale were "substantially similar" to North Carolina Class G felonies for sentencing purposes. We disagree.

In North Carolina, "[n]ew trials are not awarded because of technical errors. The error must be prejudicial." *Sisk v. Sisk*, \_\_\_ N.C. App. \_\_\_, \_\_\_, 729 S.E.2d 68, 71 (2012) (quoting *Dixon v. Weaver*, 41 N.C. App. 524, 528, 255 S.E.2d 322, 325 (1979)). "The burden of showing such prejudice . . . is upon the defendant." N.C. Gen. Stat.

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§ 15A-1443(a) (2011). “This burden may be met by showing that there is a reasonable possibility that a different result would have been reached had the error not been committed.” *State v. Jones*, 188 N.C. App. 562, 569, 655 S.E.2d 915, 920 (2008).

N.C. Gen. Stat. § 15A-1340.14(e) explains how to treat prior out-of-state convictions when determining a defendant’s prior record level:

Except as otherwise provided in this subsection, a conviction occurring in a jurisdiction other than North Carolina is classified as a Class I felony if the jurisdiction in which the offense occurred classifies the offense as a felony, or is classified as a Class 3 misdemeanor if the jurisdiction in which the offense occurred classifies the offense as a misdemeanor. . . . If the State proves by the preponderance of the evidence that an offense classified as either a misdemeanor or a felony in the other jurisdiction is substantially similar to an offense in North Carolina that is classified as a Class I felony or higher, the conviction is treated as that class of felony for assigning prior record level points.

N.C. Gen. Stat. § 15A-1340.14(e) (2011).

A prosecutor’s statements at trial are not sufficient evidence of “substantial similarity” under N.C. Gen. Stat. § 15A-1340.14(e). *See State v. Mack*, 87 N.C. App. 24, 34, 359 S.E.2d 485, 491 (1987); *see also State v. Thompson*, 309 N.C. 421, 424–25, 307 S.E.2d 156, 159 (1983) (“[We hold] that the prosecuting attorney’s statement concerning a prior conviction . . . constituted insufficient evidence to support a finding of that prior conviction . . .”). Rather, the trial court should examine “copies of the [other state’s] statutes, and compar[e] . . . their provisions to the criminal laws of North Carolina” to determine whether the State proves by preponderance of evidence the offenses are “substantially similar.” *Rich*, 130 N.C. App. at 117, 502 S.E.2d at 52; *see also* N.C. Gen. Stat. § 8-3 (2011) (“A printed copy of a statute, . . . of another state . . . shall be evidence of the statute law [of such state].”).

In the present case, Defendant’s prior New York convictions at issue are: (i) Third Degree Drug Sale (N.Y. Penal Law § 220.39 (2012)) and (ii) Fifth Degree Drug Sale (N.Y. Penal Law § 220.31 (2012)). Defendant argues the trial court committed prejudicial error by finding these convictions were “substantially similar” to North Carolina

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Class G felonies under N.C. Gen. Stat. § 90-95. If both New York drug convictions had instead been treated as North Carolina Class I felonies, Defendant would have only received 13 prior record points, as opposed to 17 points. *See* N.C. Gen. Stat. § 15A-1340.14(e) (2011). For sentencing purposes, this would have made him a Level IV offender rather than a Level V offender.

Preliminarily, we note that at trial, the prosecutor contended Defendant's New York drug convictions involved heroin. However, these statements are insufficient evidence to establish the substance involved in Defendant's prior drug convictions. *See Mack*, 87 N.C. App. at 34, 359 S.E.2d at 491. Furthermore, nothing in the record indicates Defendant's prior convictions involved heroin. The NY DCI Record only describes these convictions as "Criminal Sale Controlled Substance-3rd: Narcotic Drug (220.39 [])" and "Criminal Sale Controlled Substance-5th degree (220.31[])."

Therefore, we now compare the relevant New York and North Carolina statutes. *See Rich*, 130 N.C. App. at 117, 502 S.E.2d at 52.

**1. Third Degree Drug Sale**

N.Y. Penal Law § 220.39 states "[a] person is guilty of criminal sale of a controlled substance in the third degree when he knowingly and unlawfully sells:"

1. a narcotic drug; or
2. a stimulant, hallucinogen, hallucinogenic substance, or lysergic acid diethylamide and has previously been convicted of an offense defined in article two hundred twenty or the attempt or conspiracy to commit any such offense; or
3. a stimulant and the stimulant weighs one gram or more; or
4. lysergic acid diethylamide and the lysergic acid diethylamide weighs one milligram or more; or
5. a hallucinogen and the hallucinogen weighs twenty-five milligrams or more; or
6. a hallucinogenic substance and the hallucinogenic substance weighs one gram or more; or
7. one or more preparations, compounds, mixtures or substances containing methamphetamine, its salts, isomers or salts of isomers and the preparations, compounds, mixtures or substances are of an aggregate weight of one-eighth ounce or more; or



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8. phencyclidine and the phencyclidine weighs two hundred fifty milligrams or more; or
9. a narcotic preparation to a person less than twenty-one years old.

N.Y. Penal Law § 220.39 (2012). In New York, “[c]riminal sale of a controlled substance in the third degree is a class B felony.” *Id.* New York law defines a “narcotic drug” as “any controlled substance listed in schedule I(b), I(c), II(b), or II(c) other than methadone.” N.Y. Penal Law § 220.00 (2012).

The State contends this offense is “substantially similar” to N.C. Gen. Stat. § 90-95 (2011). This statute provides:

(a) Except as authorized by this Article, it is unlawful for any person:

(1) To manufacture, sell or deliver, or possess with intent to manufacture, sell or deliver, a controlled substance;

(2) To create, sell or deliver, or possess with intent to sell or deliver, a counterfeit controlled substance;

(3) To possess a controlled substance.

(b) Except as provided in subsections (h) and (i) of this section, any person who violates G.S. 90-95(a)(1) with respect to:

(1) A controlled substance classified in Schedule I or II shall be punished as a Class H felon, except as follows: (i) *the sale of a controlled substance classified in Schedule I or II shall be punished as a Class G felony*, and (ii) the manufacture of methamphetamine shall be punished as provided by subdivision (1a) of this subsection.

...

(2) A controlled substance classified in Schedule III, IV, V, or VI shall be punished as a Class I felon, except that the sale of a controlled substance classified in Schedule III, IV, V, or VI shall be punished as a Class H felon. The transfer of less than 5 grams of marijuana or less than 2.5 grams of a synthetic cannabinoid or any mixture containing such substance for no remuneration shall not constitute a delivery in violation of G.S. 90-95(a)(1).

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N.C. Gen. Stat. § 90-95 (2011) (emphasis added).

We do not believe the trial court erred in determining Defendant's conviction for Third Degree Drug Sale is "substantially similar" to a North Carolina class G felony under N.C. Gen. Stat. § 90-95.

The record clearly states Defendant's New York conviction involved sale of a "narcotic drug." Under New York law, this means the substance fell under Schedules I(b), I(c), II(b), or II(c). *See* N.Y. Penal Law § 220.00 (2012); N.Y. Public Health Law § 3306 (2012). These portions of the New York Drug Schedule are almost identical to the North Carolina lists of Schedule I and Schedule II controlled substances. *See* N.C. Gen. Stat. §§ 90-89 and 90-90 (2011); N.Y. Public Health Law § 3306 (2012). In fact, of the over 120 drugs listed in New York Drug Schedules I(b), I(c), II(b), or II(c), we find only a small number of drugs that do not appear in Schedules I and II of the North Carolina statutes. In North Carolina, sale of a Schedule I or II controlled substance is a Class G felony. N.C. Gen. Stat. § 90-95 (2011). Consequently, the trial court did not err in determining Third Degree Drug Sale in New York is "substantially similar" to a North Carolina Class G felony.

Although the New York and North Carolina drug schedules are not exactly identical, "the requirement set forth in N.C. Gen. Stat. § 15A-1340.14(e) is not that the statutory wording precisely match, but rather that the offense be 'substantially similar.'" *State v. Sapp*, 190 N.C. App. 698, 713, 661 S.E.2d 304, 312 (2008). Furthermore, Defendant makes no contention his New York convictions involve one of the few narcotics not listed in North Carolina Schedules I or II. Thus, even though the relevant New York and North Carolina Drug Schedules are not exactly identical, Defendant has not met his burden of showing this dissimilarity resulted in prejudicial error. *See* N.C. Gen. Stat. § 15A-1443 (2011); *Jones*, 188 N.C. App. at 569, 655 S.E.2d at 920.

Since the relevant New York and North Carolina drug schedules substantially overlap, we conclude the trial court did not err by determining Defendant's Third Degree Drug Sale offense is "substantially similar" to a North Carolina class G felony.

**2. Fifth Degree Drug Sale**

The trial court also found Defendant's prior New York conviction for Fifth Degree Drug Sale was "substantially similar" to N.C. Gen. Stat. § 90-95 (2011). We conclude no prejudicial error occurred.

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N.Y. Penal Law § 220.31 states “[a] person is guilty of criminal sale of a controlled substance in the fifth degree when he knowingly and unlawfully sells a controlled substance. Criminal sale of a controlled substance in the fifth degree is a class D felony.” N.Y. Penal Law § 220.31 (2012).

The record does not indicate the type of controlled substance involved in this offense. However, even if Defendant’s conviction for Fifth Degree Drug Sale were treated as a North Carolina Class I felony under N.C. Gen. Stat. § 15A-1340.14(e), given our analysis of his Third Degree Drug Sale conviction he would still receive 15 prior record level points. He thus would still be classified as a Level V offender. Therefore, we conclude the trial court did not commit prejudicial error by finding Defendant’s New York drug conviction for Fifth Degree Drug Sale is “substantially similar” to a North Carolina Class G felony.

**IV. Conclusion**

We conclude the trial court did not err by sentencing Defendant as a Level V offender despite inconsistencies in the NY and NC DCI Records. We further conclude the trial court did not commit prejudicial error by determining Defendant’s two New York drug convictions were “substantially similar” to North Carolina Class G felonies. Thus, the trial court’s decision is

AFFIRMED.

Judges HUNTER, Robert C. and CALABRIA concur.

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STATE OF NORTH CAROLINA  
v.  
JULIE PATRICE GARDNER

No. COA12-564

Filed 15 January 2013

**1. Appeal and Error—right of appeal lost—defendant not at fault—certiorari granted**

The Court of Appeals exercised its discretion and granted certiorari in a criminal case where defendant lost her right of

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appeal through no fault of her own, but rather because of an error on the part of trial counsel.

**2. Appeal and Error—motion to dismiss appeal—issue not moot**

The State's motion to dismiss defendant's appeal was denied where defendant's argument presented a legal question concerning the calculation of her prior record level and her previous stipulation to her prior convictions did not moot that issue.

**3. Sentencing—prior record level—additional point—elements of offense**

The trial court erred by including an additional point to calculate defendant's prior record level where all of the elements of the consolidated assault with a deadly weapon on a government officer offense were not included in any of defendant's then-prior offenses.

On writ of *certiorari* to review judgment and order of commitment entered 13 October 2011 by Judge Christopher M. Collier in Iredell County Superior Court. Heard in the Court of Appeals 25 October 2012.

*Attorney General Roy Cooper, by Assistant Attorney General Christine A. Goebel, for the State.*

*Kimberly P. Hoppin for Defendant.*

STEPHENS, Judge.

*Procedural History and Evidence*

This appeal arises from charges against Defendant Julie Patrice Gardner ("Gardner") for (i) Class 1 misdemeanor larceny; (ii) Class 2 misdemeanor resisting, delaying, or obstructing a law enforcement officer; (iii) Class H felony speeding to elude arrest; (iv) Class F assault with a deadly weapon on a government officer ("AWD-WOGO"); (v) Class 1 misdemeanor driving while license revoked; (vi) Class 1 misdemeanor aggressive driving; and (vii) attaining the status of habitual felon.

On the afternoon of 28 August 2010, Officer J.D. Bumgarner ("Officer Bumgarner") of the Statesville Police Department received a shoplifting-in-progress call, which described a white female and a black male leaving a Rugged Warehouse retail store in a green Ford

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Escort. Soon after, a green Escort passed Officer Bumgarner, who was on his way to another call. The driver, a white female, watched him as she passed. Officer Bumgarner then activated his lights and pursued her. In an attempt to escape, the Escort crossed into oncoming traffic and ran at least one red light. Officer Bumgarner caught up, and the Escort began to pass cars while in a no-passing zone. After a short time the Escort crossed left of the center line, turned onto a side street, and came to a stop. Officer Bumgarner followed and exited his car with gun drawn, instructing everyone to come out and lie down. The rear passenger exited, threw the keys down, and laid himself on the ground. The front passenger came out, but turned to reach for something in the car. Gardner came out, grabbed the keys, and returned to the Escort. The two passengers began to run away, and Officer Bumgarner struggled with Gardner to keep the keys out of the ignition. Officer Bumgarner's arm got stuck in the car, and Gardner began to drive away. The car pulled forward as Gardner accelerated, and Officer Bumgarner's arm was released without serious injury.

At that point, Officer Bumgarner began to pursue one of the other passengers on foot. He caught up with that individual and was able to identify Gardner with that person's help. Officer Bumgarner then made his way to the magistrate's office to take out warrants for Gardner's arrest. Before he was able to do so, another officer entered with Gardner in tow.

Gardner was tried in Iredell County Superior Court during the 12 October 2011 session. Pursuant to a plea agreement with the State, Gardner pled guilty to all of the offenses, as charged, in exchange for their consolidation for sentencing purposes. At sentencing, Gardner signed a prior record level worksheet indicating that she had a prior record level IV, with ten points, the minimum number required for a level IV.

Gardner's prior record level was calculated using three measures. The State presented a prior record level worksheet indicating that Gardner had two prior Class I felony convictions and four prior Class 1 misdemeanors, totaling eight points. Gardner also received one point for having committed the offenses while still on probation. Gardner received another point because the State's worksheet showed that she had a previous conviction for felony fleeing to elude arrest, one of the offenses she had also committed on 28 August 2010.

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On 13 October 2011, the trial court consolidated all of the charges against Gardner under the Class F AWDWOGO offense and sentenced Gardner within the aggravated range as a Class C felon. As a consequence, the court sentenced Gardner to a minimum term of 120 months and a maximum term of 153 months in prison.

Gardner did not give notice of appeal at trial. On 17 October 2011, counsel for Gardner went to the Iredell County Clerk of Court and signed a form, which she incorrectly believed was “sufficient notice of appeal to preserve [Gardner’s] right to appeal the judgments.” She was appointed an appellate defender and filed a petition for writ of *certiorari* on 18 June 2012. Gardner asks this Court to review the 13 October 2011 judgment and the concomitant calculation of Gardner’s prior record level, despite her deficient notice of appeal. On 12 July 2012, the State filed a motion to dismiss.

*Discussion**I. Gardner’s Petition for Writ of Certiorari*

[1] In criminal cases, a party entitled to appeal a judgment must take appeal by either: (1) giving oral notice at trial; or (2) filing written notice with the clerk of superior court and, within fourteen days, serving copies of that notice on all adverse parties. N.C.R. App. P. 4(a). Written notice of appeal must specify the party or parties taking the appeal, designate the judgment or orders from which appeal is taken and the court to which appeal is taken, and be signed by counsel of record or a *pro se* defendant. N.C.R. App. P. 4(b).

Gardner filed an improper notice of appeal. Instead of complying with Rule 4, counsel for Gardner filled out a form used for appealing decisions from district court to superior court. As such, the notice failed to correctly designate the court to which appeal was taken. In addition, Gardner failed to serve notice of her appeal on the State. Accordingly, Gardner lost her right to appeal the trial court’s judgment.

Given her failure to comply with Rule 4, Gardner requests that this Court grant her petition for *certiorari* and review the trial court’s judgment and order of commitment. When a party has lost the right to appeal because of “failure to take timely action,” the writ of *certiorari* may be issued in appropriate circumstances by either appellate court. N.C.R. App. P. 21(a). The power to grant a writ of *certiorari* “is discretionary and may only be done in appropriate circumstances.” *State v. Hammonds*, \_\_\_ N.C. App. \_\_\_, \_\_\_, 720 S.E.2d 820, 823 (2012) (internal citations and quotation marks omitted).

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In this case, Gardner's trial counsel attested that she received the form from the Iredell County Clerk of Court and believed it was "sufficient notice of appeal to preserve [Gardner's] right to appeal the judgments." Although counsel for Gardner failed to serve notice of appeal on the State and failed to designate the court to which appeal was taken, this Court has generally granted *certiorari* under N.C.R. App. P. 21(a)(1) when a defendant has pled guilty, but lost the right to appeal the calculation of her prior record level through failure to give proper oral or written notice. *See, e.g., State v. Mungo*, \_\_\_ N.C. App. \_\_\_, \_\_\_, 713 S.E.2d 542, 545 (2011). We have also held that where a defendant has lost his right of appeal through no fault of his own, but rather as a result of the actions of counsel, failure to issue a writ of *certiorari* would be manifestly unjust. *Hammonds*, \_\_\_ N.C. App. at \_\_\_, 720 S.E.2d at 823.

We are persuaded that Gardner lost her right of appeal through no fault of her own, but rather because of an error on the part of trial counsel. Thus, we exercise our discretion and grant *certiorari*.

II. *The State's Motion to Dismiss and  
Gardner's Prior Record Level*

[2] The State contends that Gardner is without the right to appeal the calculation of her prior record level because she stipulated to it. Since Gardner only raises this one issue on appeal, the State urges us to dismiss the entire case as moot.

Section 15A-1444(a2) of the North Carolina General Statutes provides that a defendant who has entered a guilty plea is entitled to appeal as a matter of right when there is a question as to whether the defendant's sentence resulted from an incorrect finding of her prior record level. N.C. Gen. Stat. § 15A-1444(a2)(1) (2011). The State argues that subsection (a2) is not applicable here because Gardner stipulated to her prior record level, effectively mooting the question of its validity. In support of that assertion, the State cites an opinion of this Court from 1998, *State v. Hamby*, 129 N.C. App. 366, 499 S.E.2d 195 (1998).

In *Hamby*, the defendant pled guilty to assault with a deadly weapon inflicting serious injury. *Id.* at 367, 499 S.E.2d at 195. The defendant entered into a plea agreement, which stipulated that (1) she had a prior record level II, (2) the punishment for the offense could be either intermediate or active in the trial court's discretion, and (3) the trial court was authorized to sentence the defendant to between 29 and 44 months in prison. *Id.* at 367, 369, 499 S.E.2d at 195,

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197. Relying on the terms of the agreement, the trial court sentenced the defendant to between 29 and 44 months in prison. *Id.* at 367, 499 S.E.2d at 195.

Interpreting subsection (a2), the *Hamby* Court pointed out that “[a] plain reading of [(a2)] indicates that the issues set out may be raised on appeal by *any* defendant who has pled guilty to a felony or misdemeanor in superior court. However, we believe the right to appeal granted by this subsection is not without limitations.” *Id.* at 369, 499 S.E.2d at 196. This Court determined in *Hamby* that the appeal of any defendant who “essentially stipulate[s] to matters that moot the issues he could have raised under subsection (a2)” should be dismissed. *Id.* Under that rule, we held that (1) the defendant had “mooted the issues of whether her prior record level was correctly determined” by admitting that her prior record level was II, (2) the offense could be either intermediate or active in the trial court’s discretion, and (3) the court was authorized to sentence her to a maximum of 44 months in prison. *Id.* at 369-70, 499 S.E.2d at 197. Thus, we dismissed the defendant’s appeal. *Id.* at 370, 499 S.E.2d at 197.

The State misinterprets our decision in *Hamby* to bar Gardner from appealing the trial court’s calculation of her prior record level. The trial court in *Hamby* simply instituted the provisions of the defendant’s plea agreement, sentencing her to between 29 and 44 months in jail pursuant to that agreement. Because *Hamby* had agreed that the trial court could sentence her in accordance with her agreement with the State, she mooted any issues that could have been raised on appeal as to her sentence.

In this case, however, Gardner signed a sentencing worksheet, which purported to calculate her prior record level to be a IV. Gardner’s signature can be found in section III of the form, designated “Stipulation,” which clarifies that she stipulates to her prior convictions and the felony prior record scoring process, while “agree[ing] with the [listed] prior record level . . . based on the information herein.” Unlike *Hamby*, the trial court in this case used the information to which Gardner stipulated to calculate her prior record level; it did not merely implement the parties’ previously agreed-upon sentencing provisions.

A defendant’s prior record level is “determined by calculating the sum of the points assigned to each of the offender’s prior convictions that the court . . . finds to have been proved . . .” N.C. Gen. Stat. § 15A-1340.14(a) (2011). A defendant’s prior convictions can be



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proved, *inter alia*, by stipulation of the parties. N.C. Gen. Stat. § 15A-1340.14(f)(1). While such convictions often effectively constitute a prior record level, a defendant is not bound by a stipulation as to any conclusion of law that is required to be made for the purpose of calculating that level. *State v. Fraley*, 182 N.C. App. 683, 691, 643 S.E.2d 39, 44 (2007) (“Although defendant’s stipulation as to prior record level is sufficient evidence for sentencing at that level . . . , the trial court’s assignment of level IV to defendant was an improper conclusion of law, which we review *de novo*.”); *see also State v. Prush*, 185 N.C. App. 472, 480, 648 S.E.2d 556, 561 (2007) (“[T]he comparison of the elements of two North Carolina criminal offenses does not require the resolution of disputed facts, but is a matter of law.”).

“While a stipulation by a defendant is sufficient to prove the existence of the defendant’s prior convictions, which may be used to determine the defendant’s prior record level for sentencing purposes, the trial court’s assignment of defendant’s prior record level is a question of law.” *State v. Wingate*, \_\_\_ N.C. App. \_\_\_, \_\_\_, 713 S.E.2d 188, 189 (2011) (citing *Fraley*, 182 N.C. App. at 691, 643 S.E.2d at 44); *see also State v. Fair*, 205 N.C. App. 315, 318, 695 S.E.2d 514, 516 (2010) (“Defendant is bound on appeal by any stipulation as to the existence of a conviction. However, even though defendant stipulated to his prior record level on three separate occasions, our cases have held that whether defendant’s convictions can be counted towards sentencing points for determination of his structured sentencing level is a conclusion of law, fully reviewable by this Court on appeal.”). “Stipulations as to questions of law are generally held invalid and ineffective, and not binding upon the courts, either trial or appellate.” *Wingate*, \_\_\_ N.C. App. at \_\_\_, 713 S.E.2d at 189 (internal quotation marks and citations omitted).

Here, Gardner argues that the trial court erred by assigning an additional, tenth point, which was sufficient to increase her prior record level from III to IV. That point was added pursuant to N.C. Gen. Stat. § 15A-1340.14(b)(6), which provides that one point is added “[i]f all the elements of the present offense are included in any prior offense for which the offender was convicted . . . .” N.C. Gen. Stat. § 15A-1340.14(b)(6) (2011). Among Gardner’s prior offenses was a previous conviction for felony fleeing to elude arrest, which she was again convicted of in this case.

On appeal, Gardner contends the tenth point was improperly added, however, because the offenses that she committed on 28

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August 2010 were consolidated under the “most serious offense” of AWDWOGO, which she had not previously committed. Because the charges were not consolidated under felony fleeing to elude arrest, Gardner asserts that the tenth point should not have been allocated. Gardner’s contention presents a legal question having to do with the calculation of her prior record level and, therefore, her previous stipulation does not moot that issue. Accordingly, we deny the State’s motion to dismiss and proceed to the merits of Gardner’s appeal.

[3] In support of her argument, Gardner asks us to follow *State v. Prush*, where we overturned the trial court’s calculation of the defendant’s prior record level because none of the defendant’s prior convictions included all of the elements of the most serious offense in his consolidated judgment. *Prush*, 185 N.C. App. at 479–80, 648 S.E.2d at 560–61. As is the case here, the defendant in *Prush* had also stipulated to his prior record level. *Id.* Gardner argues that because AWDWOGO is a more serious offense than felony fleeing to elude arrest, we must similarly remand this case for resentencing. We agree.

Section 1340.15(b) states that the trial court may consolidate multiple offenses for judgment and impose a single judgment under the “most serious offense” when an offender is convicted of more than one offense at the same time. N.C. Gen. Stat. § 15A-1340.15(b); *cf. State v. Mack*, 188 N.C. App. 365, 381, 656 S.E.2d 1, 13 (2008) (“As selling cocaine was the more serious of the two offenses contained in defendant’s sentence for selling cocaine and resisting a public officer (a Class G Felony versus a Class 2 Misdemeanor), the sentence should have been issued in accordance with the prior record level that would accompany the conviction for selling cocaine.”).

The State asserts that “the most serious offense in [Gardner’s] consolidated judgment is a Class C felony,” not the AWDWOGO charge, pointing out that both the AWDWOGO and felony fleeing to elude arrest charges were raised to Class C felonies for punishment purposes. For support, the State cites a 2011 opinion of this Court, *State v. Skipper*, \_\_\_ N.C. App. \_\_\_, 715 S.E.2d 271 (2011) and contends that the trial court was permitted to consolidate Gardner’s charges under either felony fleeing to elude arrest or AWDWOGO.

In *Skipper*, this Court determined that the defendant’s sentence should not have been reduced, even though one of his four convictions had been vacated, because the “most serious” of the remaining offenses was still a Class C felony. *Id.* at \_\_\_, 715 S.E.2d at 273. The Court reasoned that “[a]ll three underlying felonies were categorized

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as Class C felonies because of defendant's habitual felon status. . . . [and, thus,] the most serious offense in the consolidated judgment was a Class C felony." *Id.* at \_\_\_, 715 S.E.2d at 273. As a result, the panel determined that the trial court "had no choice but to enter a sentence for a single Class C felony . . . ." Because the trial court in this case consolidated all of Gardner's charges based on her status as a habitual felon, the State contends that *Skipper* controls. We disagree.

Thirteen years prior to *Skipper*, we determined that, when calculating a defendant's prior record level, the term "prior felony conviction" refers only to "a prior adjudication of the defendant's guilt or to a prior entry of a plea of guilty or no contest by the defendant. The term . . . does *not* refer to the sentence imposed for committing a prior felony." *State v. Vaughn*, 130 N.C. App. 456, 460, 503 S.E.2d 110, 113 (1998), *aff'd per curiam*, 350 N.C. 88, 511 S.E.2d 638 (1999). Accordingly, the fact that a defendant has been "*sentenced as a Class C felon*," for example, does not mean that the actual, underlying offense is transformed into a Class C felony. *See id.*; *see also State v. Flint*, 199 N.C. App. 709, 729, 682 S.E.2d 443, 454 (2009) ("Only the points from the underlying felony can be counted in the prior record level, not points for the punishment enhancement. This is because being an habitual felon is not a felony in and of itself. It is rather, a status the attaining of which subjects a person thereafter convicted of a crime to an increased punishment for that crime.") (internal quotation marks and citations omitted).

"Where a panel of the Court of Appeals has decided the same issue, albeit in a different case, a subsequent panel of the same court is bound by that precedent, unless it has been overturned by a higher court." *In re Civil Penalty*, 324 N.C. 373, 384, 379 S.E.2d 30, 37 (1989). Further, our Supreme Court has clarified that, where there is a conflicting line of cases, a panel of this Court should follow the older of those two lines. *In re R.T.W.*, 359 N.C. 539, 542 n.3, 614 S.E.2d 489, 491 n.3 (2005), *superseded by statute on other grounds*, Act of Aug. 23, 2005, ch. 398, sec. 12, 2005 N.C. Sess. Laws 1455, 1460-61 (amending various provisions of the Juvenile Code), *as recognized in In re M.I.W.*, \_\_\_ N.C. \_\_\_, \_\_\_, 722 S.E.2d 469, 472 (2012). With that in mind, we find *Skipper* and *Vaughn* are irreconcilable on this point of law and, as such, constitute a conflicting line of cases. Because *Vaughn* is the older of those two cases, we employ its reasoning here.

N.C. Gen. Stat. § 15A-1340.15(b) provides that, after consolidating a sentence, the trial court's judgment shall contain "a sentence dispo-

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sition specified for the class of offense and prior record level of the most serious offense . . . .” In this case, the trial court consolidated all of Gardner’s 28 August 2010 offenses under AWDWOGO.<sup>1</sup> Though both the AWDWOGO and felony fleeing to elude arrest convictions were raised to Class C felonies for punishment purposes, AWDWOGO is still the more serious of the two underlying felonies.<sup>2</sup> N.C. Gen. Stat. § 15A-1340.14(b)(6) requires that all the elements of the present offense be included in any prior offense at conviction in order to allocate an additional point. Here, all of the elements of the consolidated AWDWOGO offense were not included in any of Gardner’s then-prior offenses. Therefore, we find that the trial court erred by including an additional, tenth point and reverse its judgment and order of commitment. We remand for resentencing consistent with this opinion.

REVERSED and REMANDED FOR RESENTENCING.

Judges GEER and MCCULLOUGH concur.

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STATE OF NORTH CAROLINA  
v.  
WALTER BRITT GARRISON, DEFENDANT

No. COA12-589

Filed 15 January 2013

**Assault—habitual misdemeanor assault—jury instruction—physical injury**

The trial court did not commit plain error in a habitual misdemeanor assault case by failing to instruct the jury that it must find that the assaults resulted in a physical injury. In light of the uncontroverted evidence presented at trial showing that the victim suffered physical injuries as a result of the assaults, defendant could not show that absent the error, the jury probably would have returned different verdicts.

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1. On the judgment and commitment sheet, the trial court listed four offenses to which defendant pled guilty: (1) AWDWOGO, (2) habitual felon, (3) driving while license revoked, and (4) aggressive driving.

2. AWDWOGO is a Class F felony. N.C. Gen. Stat. § 14-34.2 (2011). Felony fleeing to elude arrest, coupled with the two aggravating factors in this circumstance, is a less serious, Class H felony. *See* N.C. Gen. Stat. § 20-141.5(b).

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Appeal by defendant from judgments entered 16 December 2011 by Judge Carl Fox in Durham County Superior Court. Heard in the Court of Appeals 24 October 2012.

*Attorney General Roy Cooper, by Assistant Attorney General Nancy E. Scott, for the State.*

*Richard Croutharmel for defendant.*

HUNTER, Robert C., Judge.

Walter Britt Garrison (“defendant”) was convicted of two counts of habitual misdemeanor assault. The convictions were based on the jury finding him guilty of two counts of misdemeanor assault on a female and defendant’s stipulations during the trial to the prior misdemeanor convictions alleged in the special indictments charging him with habitual misdemeanor assault. *See* N.C. Gen. Stat. §§ 14-33.2, 15A-928(c) (2011). On appeal, defendant argues that the jury instructions constituted plain error for failing to instruct the jury that it must find that the assaults resulted in a physical injury. After careful review, we find no prejudicial error.

### Background

On 4 April 2011, defendant was indicted for two counts of habitual misdemeanor assault, in violation of N.C. Gen. Stat. § 14-332, for assaults that occurred on 9 April 2010 and 6 May 2010 upon Sherry Godfrey. The substantive text of the indictments includes two paragraphs. The first paragraph lays out the facts of the underlying assaults on Sherry Godfrey, including the fact that both assaults resulted in physical injuries—a broken rib and a broken nose, cheekbone, and ruptured eardrum, respectively. The second paragraph sets out the dates and facts of defendant’s prior assault convictions. The prior convictions include a misdemeanor assault on a female that occurred on 19 October 2006 and a misdemeanor assault on a government official on 8 November 2007.

In addition to the two habitual misdemeanor assault charges, defendant was also charged with intimidating a witness, communicating threats, and injury to personal property. All charges were consolidated for trial. After the State rested, the trial court granted defendant’s motions to dismiss the charges of intimidation of a witness and communicating threats. Defendant did not present any evidence at trial.

After the State rested, defendant was arraigned outside the presence of the jury on the two prior assault convictions. Defendant

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signed stipulations of the two assaults; however, these stipulations were not included in the record on appeal. Additionally, defendant pled guilty to the two prior convictions described in the indictments when asked by the trial court.

Pursuant to N.C. Gen. Stat. § 15A-928(c)(1) (2011), the trial court submitted the cases to the jury and instructed it on two counts of assault on a female as follows:

The defendant has been charged—sorry, the defendant, a male person, has been charged with assault on a female on April 9th, 2010. An assault is an overt act or an attempt to do some immediate physical injury to the person of another.

For you to find the defendant guilty of this offense, the State must prove three things beyond a reasonable doubt.

First, that the defendant intentionally assaulted the alleged victim.

Second, that the alleged victim was a female person.

And, third, that the defendant was a male person at least eighteen years of age.

The trial court gave the same instructions with respect to the 6 May 2010 incident—the only difference was the date of the offense.

On 15 December 2011, the jury found defendant guilty of two counts of assault on a female and not guilty of injury to personal property. On 16 December 2011, the trial court sentenced defendant to nine to eleven months imprisonment for each count of habitual misdemeanor assault with the sentences to run consecutively. Defendant gave written notice of appeal 23 December 2011.

**Argument**

Defendant's sole argument on appeal is his contention that the trial court committed plain error because it failed to instruct the jury that it must find beyond a reasonable doubt that the assaults on Ms. Godfrey resulted in physical injury, a required element of habitual misdemeanor assault.

"In criminal cases, an issue that was not preserved by objection noted at trial and that is not deemed preserved by rule or law without

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any such action nevertheless may be made the basis of an issue presented on appeal when the judicial action questioned is specifically and distinctly contended to amount to plain error.” N.C.R. App. P. 10(a)(4); *see also State v. Goss*, 361 N.C. 610, 622, 651 S.E.2d 867, 875 (2007), *cert. denied*, 555 U.S. 835, 172 L. Ed. 2d 58 (2008). Plain error arises when the error is “ ‘so basic, so prejudicial, so lacking in its elements that justice cannot have been done[.]’ ” *State v. Odom*, 307 N.C. 655, 660, 300 S.E.2d 375, 378 (1983) (quoting *United States v. McCaskill*, 676 F.2d 995, 1002 (4th Cir. 1982), *cert. denied*, 459 U.S. 1018, 74 L. Ed. 2d 513 (1982)). “Under the plain error rule, defendant must convince this Court not only that there was error, but that absent the error, the jury probably would have reached a different result.” *State v. Jordan*, 333 N.C. 431, 440, 426 S.E.2d 692, 697 (1993); *see also State v. Lawrence*, \_\_\_ N.C. \_\_\_, \_\_\_, 723 S.E.2d 326, 334 (2012) (noting that to establish plain error, “a defendant must establish prejudice that, after examination of the entire record, the error had a probable impact on the jury’s finding that the defendant was guilty” (internal quotation marks omitted)).

Habitual misdemeanor assault is a substantive offense, not a status to enhance a defendant’s sentence. *State v. Smith*, 139 N.C. App. 209, 214, 533 S.E.2d 518, 520, *appeal dismissed*, 353 N.C. 277, 546 S.E.2d 391 (2000). Pursuant to N.C. Gen. Stat. § 14-33.2 (2011),

[a] person commits the offense of habitual misdemeanor assault if that person violates any of the provisions of G.S. 14-33 and causes physical injury, or G.S. 14-34, and has two or more prior convictions for either misdemeanor or felony assault, with the earlier of the two prior convictions occurring no more than 15 years prior to the date of the current violation.

(Emphasis added.) Assault on a female, a class A1 misdemeanor, is an offense included in N.C. Gen. Stat. § 14-33 (2011). In 2004, N.C. Gen. Stat. § 14-33.2 was amended by N.C. Sess. Laws 2004-186, § 10.1 to specifically require that if the basis of a habitual misdemeanor assault charge is an offense under N.C. Gen. Stat. § 14-33, there must also be a physical injury.

In contrast to habitual misdemeanor assault, “[t]he elements of assault on a female are (1) an assault, (2) upon a female person, (3) by a male person (4) who is at least eighteen years old.” *State v.*

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*Herring*, 322 N.C. 733, 743, 370 S.E.2d 363, 370 (1988).<sup>1</sup> The State is not required to prove that the female incurred a physical injury.

Based on the circumstances of this case, to prove defendant was guilty of habitual misdemeanor assault pursuant to N.C. Gen. Stat. § 14-33.2, the State was required to prove the following elements: (1) defendant was convicted of two previous misdemeanor assaults, specifically the assaults listed in the indictments (the 19 October 2006 assault on a female and the 8 November 2007 assault on a government official); (2) defendant assaulted Ms. Godfrey on 9 April 2010 and 6 May 2010; and (3) the assaults caused physical injuries. Defendant stipulated to the two prior assaults and pled guilty to those convictions outside the presence of the jury. Moreover, the jury was properly instructed on the underlying assault on a female charges. However, the trial court did not instruct the jury that they must find that the assaults caused physical injuries in order to convict defendant of habitual misdemeanor assault. Thus, the trial court erred in failing to instruct the jury on all necessary elements for defendant's conviction of habitual misdemeanor assault.

To determine whether this error constituted plain error, our Supreme Court's decision in *Lawrence* provides guidance. In *Lawrence*, the defendant was charged with conspiracy to commit robbery with a dangerous weapon and attempted robbery with a dangerous weapon. *Id.* at \_\_\_, 723 S.E.2d at 329. The trial court properly instructed the jury on the attempted robbery charge. *Id.* However, when instructing the jury on the conspiracy charge, the trial court "erroneously omitted the element that the weapon must have been used to endanger or threaten the life of the victim." *Id.* While this Court held that the omission constituted plain error, our Supreme Court disagreed noting that since the trial court properly instructed the jury on attempted robbery, the only additional element necessary for a conviction on the conspiracy charge was an agreement. *Id.* at \_\_\_, 723 S.E.2d at 334. Relying on the "overwhelming and uncontroverted evidence" of the agreement between the conspirators, our Supreme Court held that the defendant "failed to meet his burden of demonstrating plain error." *Id.* at \_\_\_, 723 S.E.2d at 335.

Here, like *Lawrence*, the trial court failed to properly instruct on all necessary elements of a habitual misdemeanor assault charge;

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1. Although *Herring* was quoting N.C. Gen. Stat. § 14-33(b)(2) (1986), the former assault on a female statute, assault on a female is currently codified under N.C. Gen. Stat. § 14-33(c)(2).



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specifically, it omitted the element of physical injury. However, there was plenary evidence presented at trial that both of the underlying assaults on Ms. Godfrey resulted in physical injuries. Ms. Godfrey testified that after the 9 April incident, she sustained a broken rib and sought treatment at Duke Hospital for her injuries. Ms. Godfrey's sister, Maretha Godfrey, took her to the hospital. Maretha stated that Ms. Godfrey told her she was in pain and kept complaining about her side hurting.

Moreover, with regard to the 6 May incident, Ms. Godfrey testified that she was in pain—specifically, her right ear and right side of her face hurt. Ms. Godfrey also testified that she had bruises on her back, right side of her face, right ear, and wrists. After the police arrived on the scene, an officer called EMS. Mark Onifrey, a Durham County EMS worker, testified that he observed numerous physical injuries on Ms. Godfrey, including bruises and swelling of her face, ears, and nose. The State submitted into evidence the medical records completed by Mark Onifrey which documented her injuries. Medical records from Duke Hospital were also introduced at trial indicating that Ms. Godfrey suffered a nasal fracture and various contusions. In addition, the State submitted two photographs of Ms. Godfrey, taken after the 6 May incident, which purportedly illustrated her injuries on her face.<sup>2</sup>

In light of the uncontroverted evidence presented at trial showing that Ms. Godfrey suffered physical injuries as a result of the assaults, defendant cannot show that, absent the error, the jury probably would have returned different verdicts. Thus, he cannot show the prejudicial effect of the error necessary to establish plain error, and his argument is overruled.

In support of his argument that the failure to instruct on all necessary elements requires that his convictions be vacated, defendant cites *State v. Bowen*, 139 N.C. App. 18, 533 S.E.2d 248 (2000). In *Bowen*, this Court vacated several of the defendant's convictions based on erroneous jury instructions. *Id.* at 22-23, 533 S.E.2d at 251-52. Because the trial court failed to instruct the jury on first degree (forcible) sexual offense, the offense the defendant was charged with, but instead instructed on statutory sexual offense, the Court vacated three of the defendant's convictions for first degree

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2. We note that although these photographs were included in the record, the copies are extremely dark. Therefore, we are unable to ascertain how clearly they show any injuries sustained by Ms. Godfrey and must rely on her testimony at trial regarding what the images show.

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(forcible) sexual offense. *Id.* at 25-26, 533 S.E.2d at 253. Moreover, the Court vacated one of the defendant's convictions for indecent liberties with a child because the trial court failed to instruct on the charge entirely. *Id.* By failing to do so, this Court concluded that "the trial court effectively dismissed the indictment of the same." *Id.* at 26, 533 S.E.2d at 254.

However, *Bowen* is distinguishable because the defendant's convictions were vacated because the trial court instructed on the wrong charge and failed to provide any jury instructions with regard to the indecent liberties charge. In contrast, here, the trial court properly instructed the jury on an assault on a female charge, the offense that served as the basis for defendant's habitual misdemeanor assault charges. However, it failed to instruct on one of the required elements of habitual misdemeanor assault, a physical injury. Thus, we must rely on *Lawrence* as controlling, see *Cannon v. Miller*, 313 N.C. 324, 327 S.E.2d 888 (1985) (holding that this Court has a "responsibility to follow" decisions issued by our Supreme Court), and defendant's reliance on *Bowen* is misplaced.

**Conclusion**

Although the trial court erred in failing to properly instruct on all the necessary elements of a habitual misdemeanor assault charge, we conclude that defendant did not establish that the jury probably would have reached different verdicts absent that error. Therefore, defendant failed to establish plain error.

No prejudicial error.

Judges CALABRIA and HUNTER, JR., Robert N. concur.

**STATE v. HOSKINS**

[225 N.C. App. 177 (2013)]

STATE OF NORTH CAROLINA

v.

ARCHIE EDWARD HOSKINS

No. COA12-799

Filed 15 January 2013

**1. Sentencing—habitual felon—three prior felonies—sufficient evidence**

The trial court did not err by denying defendant's motion to dismiss a habitual felon charge. The State introduced evidence of defendant's convictions on two felonies during the habitual felon phase and evidence of a third felony, a first-degree sexual offense conviction, during the trial for failing to register as a sex offender, the principal offense. There is no need to reintroduce evidence presented during the trial for the principal offense at the habitual felon hearing.

**2. Sentencing—habitual felon—jury instructions—sufficient evidence**

The trial court did not commit plain error in its jury instructions regarding a habitual felon charge as there was sufficient evidence to support the instructions.

Appeal by Defendant from judgment entered 23 February 2012 by Judge Hugh B. Lewis in Mecklenburg County Superior Court. Heard in the Court of Appeals 14 November 2012.

*Attorney General Roy Cooper, by Assistant Attorney General Lauren D. Tally, for the State.*

*Charlotte Gail Blake for Defendant.*

HUNTER, JR., Robert N., Judge.

Archie Edward Hoskins ("Defendant") appeals from a jury verdict finding him guilty of attaining habitual felon status. Defendant argues that his motion to dismiss the habitual felon charge should have been granted because the State presented evidence of only two qualifying felonies. We disagree and find no error.

**I. Factual & Procedural Background**

On 14 March 2011, Defendant was indicted for failing to register as a sexual offender. On 16 May 2011, Defendant was indicted for

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attaining habitual felon status. On 23 February 2012, a jury convicted Defendant of both charges in Mecklenburg County Superior Court, the Honorable Hugh B. Lewis presiding. Defendant was sentenced to 96-125 months imprisonment.

Habitual felon charges are tried under a procedure contained in N.C. Gen. Stat. § 14-7.5. An initial trial is conducted to determine the guilt of a defendant on a felony indictment (“the principal offense”). During the trial on the principal offense, the defendant’s potential status as an habitual felon on the basis of prior convictions is not brought to the attention of the jury in considering the principal offense. N.C. Gen. Stat. § 14-7.5 (2011). If the defendant is convicted on the principal offense, then the court begins the “habitual felon” phase of the trial and the same jury determines whether the defendant has attained the status of an habitual felon.

During Defendant’s trial for failing to register as a sex offender, the State introduced evidence of Defendant’s conviction in 1987 for first-degree sexual offense. On cross-examination, Defendant admitted having been convicted of first-degree sexual offense in 1987.

During the habitual felon phase of the trial, the State introduced evidence of Defendant’s convictions for two additional felonies: a 1972 breaking and entering conviction and a 1978 kidnapping conviction. Defendant made a motion to dismiss the habitual felon charge on the basis that the State had only presented evidence of two felonies, while three felonies were required to find Defendant guilty of attaining habitual felon status. The State, however, argued that evidence of a third felony, the 1987 conviction, had been introduced during the trial for the principal offense, failing to register as a sex offender. The State argued that the habitual felon phase was not an independent proceeding and thus the evidence of the 1987 offense presented at the trial for failing to register satisfied the State’s burden of presenting evidence of a third felony. The trial court agreed with the State and denied Defendant’s motion to dismiss. Defendant entered oral notice of appeal following his convictions.

**II. Jurisdiction and Standard of Review**

As Defendant appeals from the final judgment of a superior court, an appeal lies of right with this Court pursuant to N.C. Gen. Stat. § 7A-27(b) (2011).

“This Court reviews the trial court’s denial of a motion to dismiss *de novo*.” *State v. Smith*, 186 N.C. App. 57, 62, 650 S.E.2d 29, 33 (2007).

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[225 N.C. App. 177 (2013)]

“ ‘Upon defendant’s motion for dismissal, the question for the Court is whether there is substantial evidence (1) of each essential element of the offense charged, or of a lesser offense included therein, and (2) of defendant’s being the perpetrator of such offense. If so, the motion is properly denied.’ ” *State v. Fritsch*, 351 N.C. 373, 378, 526 S.E.2d 451, 455 (quoting *State v. Barnes*, 334 N.C. 67, 75, 430 S.E.2d 914, 918 (1993)).

Defendant also argues that the jury instructions, which were not objected to at trial, were in error. “In criminal cases, an issue that was not preserved by objection noted at trial and that is not deemed preserved by rule or law without any such action nevertheless may be made the basis of an issue presented on appeal when the judicial action questioned is specifically and distinctly contended to amount to plain error.” N.C. R. App. P. 10(a)(4); *see also State v. Goss*, 361 N.C. 610, 622, 651 S.E.2d 867, 875 (2007). The North Carolina Supreme Court “has elected to review unpreserved issues for plain error when they involve either (1) errors in the judge’s instructions to the jury, or (2) rulings on the admissibility of evidence.” *State v. Gregory*, 342 N.C. 580, 584, 467 S.E.2d 28, 31 (1996).

Plain error arises when the error is “ ‘so basic, so prejudicial, so lacking in its elements that justice cannot have been done[.]’ ” *State v. Odom*, 307 N.C. 655, 660, 300 S.E.2d 375, 378 (1983) (quoting *United States v. McCaskill*, 676 F.2d 995, 1002 (4th Cir.)). “Under the plain error rule, [a] defendant must convince this Court not only that there was error, but that absent the error, the jury probably would have reached a different result.” *State v. Jordan*, 333 N.C. 431, 440, 426 S.E.2d 692, 697 (1993).

**III. Analysis**

[1] Defendant argues that at the habitual felon hearing the State introduced evidence of only two of three felonies required to convict him of attaining habitual felon status, and that therefore his motion to dismiss should have been granted. We disagree.

“It is . . . clear that the proceeding by which the state seeks to establish that defendant is an habitual felon is necessarily ancillary to a pending prosecution for the ‘principal,’ or substantive, felony.” *State v. Allen*, 292 N.C. 431, 433-34, 233 S.E.2d 585, 587 (1977). Habitual felon status is not a crime in and of itself but is a status which may lead to increased punishment for the principal offense. *Id.* at 435, 233 S.E.2d at 588.

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Because of the ancillary nature of the habitual felon phase, our Supreme Court held that there is no need to re-empanel the jury to consider the habitual felon charge following the trial for the principal felony. *State v. Todd*, 313 N.C. 110, 120, 326 S.E.2d 249, 255 (1985). “[A] defendant’s ‘trial’ on the issue of whether defendant should be sentenced as an habitual offender [is] analogous to the separate sentencing hearing conducted under N.C.G.S. § 15A-2000 [(capital punishment)].” *Id.* Since the capital punishment statute does not require the jury to be re-empaneled for the sentencing hearing, likewise, the jury does not need to be re-empaneled for an habitual felon hearing. *Id.*

As our Supreme Court has found the habitual felon hearing analogous to a capital felony sentencing hearing, we turn to the capital punishment statutes regarding evidence. During the separate sentencing hearing for a capital felony, there is no requirement to resubmit evidence from the guilt phase. N.C. Gen. Stat. § 15A-2000(a)(3) (2011). This is consistent with the principle that the sentencing hearing is not a separate proceeding, but is ancillary to the trial for the principal offense.

Likewise, the hearing to determine whether Defendant attained the status of an habitual felon is ancillary to the trial for the principal offense. There is therefore no need to reintroduce evidence presented during the trial for the principal offense at the habitual felon hearing. The evidence presented during the trial for the principal offense can be used to prove the habitual felon charge.

In order to be convicted of attaining habitual felon status, a defendant must have been convicted of or pled guilty to three felony offenses. N.C. Gen. Stat. § 14-7.1 (2011).

In the present case, the State introduced evidence of Defendant’s convictions on two felonies during the habitual felon phase. The State had previously introduced evidence of a third felony, the first-degree sexual offense conviction from 1987, during the trial for failing to register as a sex offender, the principal offense. Because there was no need to reintroduce evidence from the hearing for the principal offense, the introduction of these three felonies was enough for the jury to decide that Defendant had attained the status of an habitual felon.

Defendant expresses concern that given the number of misdemeanors and felonies referenced in the trial for the principal offense, the jury “could have no idea . . . that the State was relying on” the 1987

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conviction as the third required felony. However, the State laid out in its opening arguments for the habitual felon phase which three felonies it was relying on, including the 1987 conviction, and again referenced the 1987 conviction in closing arguments. There was no question to the jury which felonies the State was relying on.

**[2]** Defendant also requests plain error review regarding the jury instructions, which included references to the three felonies alleged by the State. Defendant argues that these instructions were not supported by the evidence for the same reasons he argues his motion to dismiss should have been granted. For the reasons stated above, we find sufficient evidence to support the jury instructions.

**IV. Conclusion**

For the foregoing reasons we find

NO ERROR.

Judges HUNTER, Robert C. and CALABRIA concur.

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STATE OF NORTH CAROLINA

v.

PRESTON R. JONES

No. COA12-992

Filed 15 January 2013

**1. Probation and Parole—probation revocation—willful violation—remand—clerical error**

The trial court did not abuse its discretion by revoking defendant's probation where defendant was convicted of a criminal offense while on probation, and defendant admitted to the willfulness of the violation. The matter was remanded to the trial court to fix a clerical error.

**2. Constitutional Law—effective assistance of counsel—probation revocation hearing—no different outcome**

Defendant received ineffective assistance of counsel in a probation revocation hearing where there was no reasonable probability that further evidence concerning defendant's education,

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lack of financial resources, or disability would have affected the outcome of defendant's probation violation hearing.

Appeal by defendant from judgment entered 5 March 2012 by Judge Thomas H. Lock in Johnston County Superior Court. Heard in the Court of Appeals 12 December 2012.

*Attorney General Roy Cooper, by Assistant Attorney General Tiffany Y. Lucas, for the State.*

*Daniel F. Read for defendant appellant.*

McCULLOUGH, Judge.

Preston R. Jones ("defendant") appeals from a judgment of the trial court revoking his probation and activating his sentence. We affirm and remand for correction of clerical errors.

### I. Background

On 15 December 2011, defendant pled guilty to the charge of assault with a deadly weapon inflicting serious injury. Pursuant to the plea arrangement, defendant was sentenced to 20 to 33 months' imprisonment, suspended for 36 months of supervised probation.

On 7 February 2012, defendant's probation officer filed a probation violation report indicating defendant had violated four conditions of his probation as follows: (1) failure to complete community service; (2) multiple violations of curfew; (3) failure to pay court fees; and (4) failure to obtain employment. On 2 March 2012, defendant's probation officer filed a second probation violation report indicating defendant had violated the terms of his probation by committing a criminal offense while he was on probation in that he was convicted for possession of 0.5 to 1.5 ounces of marijuana on 23 February 2012.

A probation violation hearing was held on 5 March 2012. At the hearing, defendant's counsel indicated defendant's admission to willfully violating the terms of his probation. Defendant's counsel argued to the trial court that, despite defendant's admission, consideration should be given to defendant's age and apparent disability that makes it difficult for him to find employment. Defendant's counsel also argued to the trial court that consideration should be given to defendant's representations that he had been attending community college classes and that he had acted in self-defense during the incident giving



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rise to the underlying assault conviction. Defendant's counsel asked the trial court to consider ordering a 90-day confinement period in response to the violations rather than revoking defendant's probation.

After considering arguments of counsel, defendant's admission, and testimony from defendant's probation officer, the trial court found that defendant had willfully violated the terms of his probation as alleged. Consequently, the trial court revoked defendant's probation and activated his sentence. The trial court recommended a substance abuse treatment program for defendant while serving his sentence.

Following the hearing, the trial court entered a written judgment revoking defendant's probation and activating his sentence. The trial court's judgment specifically found as fact that defendant had willfully violated paragraphs one through four of the 7 February 2012 probation violation report and that the court was authorized to revoke defendant's probation "because the defendant twice previously has been confined in response to violation under G.S. 15A-1344(d2)." On 7 March 2012, defendant was returned to open court, where he gave oral notice of appeal from the trial court's judgment revoking his probation and activating his sentence.

## II. Probation Revocation

### *A. Standard of Review*

A hearing to revoke a defendant's probationary sentence only requires that the evidence be such as to reasonably satisfy the judge in the exercise of his sound discretion that the defendant has willfully violated a valid condition of probation or that the defendant has violated without lawful excuse a valid condition upon which the sentence was suspended. The judge's finding of such a violation, if supported by competent evidence, will not be overturned absent a showing of manifest abuse of discretion.

*State v. Young*, 190 N.C. App. 458, 459, 660 S.E.2d 574, 576 (2008) (internal quotation marks and citations omitted).

### *B. Probation Revocation Under The Justice Reinvestment Act of 2011*

[1] The Justice Reinvestment Act of 2011 ("the Justice Reinvestment Act"), 2011 N.C. Sess. Laws 192, amended and modified certain statutory provisions governing probation revocation. First, the Justice

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Reinvestment Act amended subsection (a) of N.C. Gen. Stat. § 15A-1344 to include the following provision: “The court may only revoke probation for a violation of a condition of probation under G.S. 15A-1343(b)(1) or G.S. 15A-1343(b)(3a), except as provided in G.S. 15A-1344(d2). Imprisonment may be imposed pursuant to G.S. 15A-1344(d2) for a violation of a requirement other than G.S. 15A-1343(b)(1) or G.S. 15A-1343(b)(3a).” 2011 N.C. Sess. Laws 192, § 4.(b). Accordingly, the trial court retains the authority to revoke a defendant’s probation in the first instance only for a violation of N.C. Gen. Stat. § 15A-1343(b)(1) or N.C. Gen. Stat. § 15A-1343(b)(3a).

N.C. Gen. Stat. § 15A-1343(b)(1) (2011) provides that as a regular condition of probation, a defendant must “[c]ommit no criminal offense in any jurisdiction.” *Id.* N.C. Gen. Stat. § 15A-1343(b)(3a) was added by the Justice Reinvestment Act and adds as a regular condition of probation that a defendant is “[n]ot to abscond, by willfully avoiding supervision or by willfully making the defendant’s whereabouts unknown to the supervising probation officer.” 2011 N.C. Sess. Laws 192, § 4.(a).

In addition, the Justice Reinvestment Act added a new subsection to N.C. Gen. Stat. § 15A-1344, which provides:

**(d2) Confinement in Response to Violation.**—When a defendant has violated a condition of probation other than G.S. 15A-1343(b)(1) or G.S. 15A-1343(b)(3a), the court may impose a 90-day period of confinement for a defendant under supervision for a felony conviction or a period of confinement of up to 90 days for a defendant under supervision for a misdemeanor conviction. The court may not revoke probation unless the defendant has previously received a total of two periods of confinement under this subsection. A defendant may receive only two periods of confinement under this subsection.

2011 N.C. Sess. Laws 192, § 4.(c).<sup>1</sup> Accordingly, under these revised provisions, the trial court “may *only* revoke probation if the defendant commits a criminal offense or absconds[,]” and may “impose a ninety-day period of confinement for a probation violation

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1. We note subsection (d2) was rewritten for clarification effective 16 July 2012. 2012 N.C. Sess. Laws 188, § 2. The modifications contained no substantive changes to the subsection as written under the Justice Reinvestment Act. However, because defendant’s probation violations occurred prior to 16 July 2012, we apply the subsection as written prior to the 16 July 2012 modification.

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other than committing a criminal offense or absconding.” *State v. Floyd*, \_\_\_ N.C. App. \_\_\_, \_\_\_, 714 S.E.2d 447, 450 (2011).

These new and revised subsections became effective on 1 December 2011 and apply to probation violations occurring on or after that date. 2011 N.C. Sess. Laws 192, § 4.(d). Because defendant’s probation violations all occurred after 1 December 2011, the newly modified and amended provisions governed defendant’s probation violation hearing.

*C. Application to the Present Case*

In the findings section of the judgment, a box is checked indicating that the trial court had authority to revoke defendant’s probation under the Justice Reinvestment Act “because the defendant twice previously has been confined in response to violation under G.S. 15A-1344(d2).” Defendant contends on appeal that this finding is not supported by any competent evidence in the record, and we agree. However, as defendant acknowledges, this finding appears to be the result of a clerical error. “A clerical error is an error resulting from a minor mistake or inadvertence, especially in writing or copying something on the record, and not from judicial reasoning or determination.” *State v. Lark*, 198 N.C. App. 82, 95, 678 S.E.2d 693, 702 (2009) (internal quotation marks, brackets, and citations omitted), *disc. review denied*, 363 N.C. 808, 692 S.E.2d 111 (2010).

The record and the transcript reveal that the 2 March 2012 probation violation report indicating that defendant had been convicted of a criminal offense, namely possession of 0.5 to 1.5 ounces of marijuana, while he was on probation was considered by the trial court at defendant’s probation violation hearing and was incorporated by reference in the trial court’s judgment revoking defendant’s probation. In addition, the transcript reveals both that defendant admitted at the probation violation hearing to the willfulness of the violations contained in both probation violation reports and that the trial court noted that “[t]his is, even under the Justice Reinvestment Act, a violation in which probation can be revoked[,] if convicted of another offense.” Accordingly, the trial court should have checked the box finding that it had the authority to revoke defendant’s probation under the Justice Reinvestment Act “for the willful violation of the condition(s) that he/she not commit any criminal offense, G.S. 15A-1343(b)(1), or abscond from supervision, G.S. 15A-1343(b)(3a), as set out above.”

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The finding of such a willful violation by defendant is supported by competent evidence and supports the trial court's decision to revoke defendant's probation under the provisions of the Justice Reinvestment Act. Therefore, we must remand for correction of this clerical error in the judgment. *See Lark*, 198 N.C. App. at 95, 678 S.E.2d at 702 ("When, on appeal, a clerical error is discovered in the trial court's judgment or order, it is appropriate to remand the case to the trial court for correction because of the importance that the record "speak the truth." ' (quoting *State v. Smith*, 188 N.C. App. 842, 845, 656 S.E.2d 695, 696 (2008))).

In addition, the findings section of the judgment states: "The condition(s) violated and the facts of each violation are as set forth . . . in paragraph(s) 1;2;3;4; in the Violation Report or Notice dated 02/07/2012." The omission of paragraph one of the 2 March 2012 violation report appears to also be the result of inadvertence and therefore a clerical error, as the transcript reveals that the trial court specifically addressed defendant's conviction at the probation violation hearing. The trial court not only noted its authority to revoke defendant's probation under the Justice Reinvestment Act because of defendant's conviction of another offense, but also stated it did not initially see the other violations, only "the conviction," and inquired into a prior misdemeanor marijuana conviction on defendant's record. Further, the trial court specifically announced its finding that defendant was "in willful violation of the terms and conditions of probation as alleged" and recommended substance abuse treatment for defendant. Therefore, it appears that the judgment should likewise be corrected to refer also to paragraph one of the 2 March 2012 violation report.

Defendant further contends that even considering the proper findings of fact, the trial court abused its discretion in revoking his probation by failing to consider certain mitigating circumstances, including his youth, lack of education, lack of financial resources, and disability, which limited his ability to comply with the terms of his probation. However, the transcript of the probation violation hearing shows that these circumstances were presented to the trial court by defendant's counsel, and the record reveals no way in which the trial court failed to consider those arguments. Moreover, although those circumstances may concern the probation violations contained in the 7 February 2012 violation report, defendant has failed to show

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how those circumstances impaired his ability to comply with the terms of his probation by not committing another criminal offense, a violation to which defendant admitted willfulness at the hearing. We discern no abuse of discretion in the trial court's judgment revoking defendant's probation in this case, and defendant's argument on this issue is therefore without merit.

**III. Ineffective Assistance of Counsel**

**[2]** Defendant's remaining argument on appeal is that he received ineffective assistance of counsel because his counsel failed to develop any evidence concerning defendant's education, lack of financial resources, and disability, which were mitigating factors the trial court may have considered in making its determination of whether to revoke defendant's probation. Defendant argues his counsel's failure to likewise request a continuance to investigate and gather such information for the probation violation hearing caused him to suffer the ineffective assistance of counsel.

To prevail on a claim of ineffective assistance of counsel, a defendant must first show that his counsel's performance was deficient and then that counsel's deficient performance prejudiced his defense. Deficient performance may be established by showing that counsel's representation fell below an objective standard of reasonableness. Generally, to establish prejudice, a defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.

*State v. Allen*, 360 N.C. 297, 316, 626 S.E.2d 271, 286 (2006) (internal quotation marks and citations omitted). "[I]f a reviewing court can determine at the outset that there is no reasonable probability that in the absence of counsel's alleged errors the result of the proceeding would have been different, then the court need not determine whether counsel's performance was actually deficient." *State v. Braswell*, 312 N.C. 553, 563, 324 S.E.2d 241, 249 (1985).

After examining the record before us, we conclude that there is no reasonable probability that further evidence concerning defendant's education, lack of financial resources, and disability would have affected the outcome of defendant's probation violation hearing. The

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record reveals the probation violation that triggered defendant's revocation was his commission of another criminal offense, and this violation is the violation with which the trial court was concerned in determining whether to revoke defendant's probation. The trial court made no further inquiry of defendant's counsel as to the mitigating circumstances expressed by defendant. Rather, the trial court focused on defendant's prior drug conviction, as well as the new drug conviction committed by defendant while he was on probation. As we have stated, none of the mitigating factors expressed by defendant concern his commission of a separate criminal offense. Thus, defendant cannot show how the outcome of the probation violation hearing would have been different, and his argument on this issue is therefore without merit.

**IV. Conclusion**

We affirm the trial court's revocation of defendant's probation. Defendant was convicted of a criminal offense while on probation, and defendant admitted to the willfulness of the violation at the probation violation hearing. Under the newly modified and amended terms of the Justice Reinvestment Act, the trial court was authorized to revoke defendant's probation upon a finding of such a willful violation. Such finding is supported by competent evidence in the present case, and we discern no abuse of discretion by the trial court in revoking defendant's probation. In addition, we hold defendant received the effective assistance of counsel at the probation violation hearing. We remand, however, to allow the trial court to correct the clerical errors noted herein.

Affirmed in part, remanded in part.

Judges STEELMAN and STEPHENS concur.

**STATE v. LANFORD**

[225 N.C. App. 189 (2013)]

STATE OF NORTH CAROLINA

v.

TODD LEWIS LANFORD, DEFENDANT

No. COA12-623

Filed 15 January 2013

**1. Child Abuse, Dependency, and Neglect—malicious castration—assault—sufficient evidence**

The trial court did not err by denying defendant's motion to dismiss the charges of attempted malicious castration, assault by strangulation, multiple counts of assault with a deadly weapon inflicting serious injury, and felonious child abuse because there sufficient evidence of each element of every crime charged and evidence that defendant was the perpetrator.

**2. Constitutional Law—right to confrontation—juvenile witness testimony—closed-circuit television**

The trial court did not err in a child abuse case by granting the State's motion to allow the juvenile victim to testify outside defendant's presence via closed-circuit television (CCTV). Pursuant to *State v. Jackson*, 216 N.C. App. 238, 717 S.E.2d 35 (2011), the use of one-way CCTV to procure the victim's testimony did not inhibit defendant's ability to confront his accuser in violation of the Constitution, despite the lack of face-to-face confrontation, where the trial testimony was subjected to rigorous adversarial testing by defendant's attorney. Further, the trial court's findings of fact underlying its decision to permit use of CCTV were supported by the evidence.

Appeal by defendant from judgments entered on or about 5 August 2011 by Judge Gregory A. Weeks in Superior Court Cumberland County. Heard in the Court of Appeals 13 December 2012.

*Attorney General Roy A. Cooper, III by Assistant Attorney General Anne M. Middleton, for the State.*

*Glover & Petersen, P.A. by Ann B. Petersen, for defendant-appellant.*

STROUD, Judge.

**STATE v. LANFORD**

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**I. Background**

During the summer of 2008, Todd Lanford (“defendant”) moved in with Tiffany and her then eleven-year-old son Joseph<sup>1</sup> While Tiffany worked during the day, defendant stayed home most of the time and would babysit Joseph when he stayed home from school. Defendant first started disciplining Joseph with grounding, but after approximately three months, defendant began to hit Joseph when he did something that defendant did not like. The violence escalated and during the last week of October 2008 defendant hit and kicked Joseph so badly that he stayed home from school the entire week. Earlier in October, Joseph’s neighbors had begun noticing bruises and just before Halloween 2008 Tiffany finally showed one of those neighbors the extent of the bruising on Joseph’s side. Tiffany initially refused to divulge how he got the bruises, alternatively attributing them to Joseph’s restless sleep, falling out of bed, or spirits attacking him at night.

The Cumberland County Department of Social Services (DSS) was called to investigate. When a DSS social worker arrived at Tiffany’s house, she answered the door and let the social worker talk to Joseph. She immediately noticed extensive bruising on Joseph’s face, including two black eyes. Joseph claimed that he got the black eyes from thrashing in bed and hitting the ladder on his bunk bed. The DSS social worker had Tiffany and defendant take Joseph to the hospital to be examined. After an initial examination, Dr. Sharon Cooper, a pediatrician specializing in treating abused children, was called in to examine Joseph. When Dr. Cooper examined Joseph she discovered thirty-three distinct injuries, including bruises on his face, sides, legs, knees, buttocks, abdomen, chest, and a 2.5 inch laceration on Joseph’s penis. Dr. Cooper recognized that these injuries were consistent with abuse and that there was no possibility that these injuries occurred accidentally.

When asked by the investigating detective, Tiffany denied hitting Joseph and denied knowing how Joseph was hurt. Joseph also initially refused to explain who beat him. After some conversations with Joseph, Joseph explained that he began getting bruises shortly after defendant moved in and denied that his mother hit him. When Dr. Cooper saw Joseph at a later follow-up session, Joseph identified defendant as the one who had been hitting him.

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1. To protect the identities of the juvenile and his mother and for ease of reading we will refer to both of them by pseudonym.



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Defendant was indicted for and the State proceeded to trial on one count of attempted malicious castration of a privy member, four counts of felony child abuse, three counts of assault with a deadly weapon inflicting serious injury, one count of first degree statutory sex offense, one count of indecent liberties with a child, one count of assault by strangulation, and one count of misdemeanor communicating threats. The case went to jury verdict and the jury found defendant guilty of all charges. Defendant was sentenced to consecutive periods of confinement of 288 to 355 months for the sex offense charges, 29 to 44 months for the assault with a deadly weapon inflicting serious injury, felony child abuse and communicating threats charges, and 77 to 102 months confinement for attempted malicious castration, and the linked assault with a deadly weapon inflicting serious injury and felony child abuse charges. Defendant gave timely notice of appeal in open court.

**II. Sufficiency of the Evidence**

**[1]** Defendant first argues on appeal that the trial court erred in denying his motion to dismiss all the charges against him because there was insufficient evidence for a reasonable juror to find him guilty of attempted malicious castration, assault by strangulation, and multiple counts of assault with a deadly weapon inflicting serious injury, and felonious child abuse. For the following reasons, we disagree.

**A. Standard of Review**

The standard of review for a motion to dismiss is well known. A defendant's motion to dismiss should be denied if there is substantial evidence of: (1) each essential element of the offense charged, and (2) of defendant's being the perpetrator of the charged offense. Substantial evidence is relevant evidence that a reasonable mind might accept as adequate to support a conclusion. The Court must consider the evidence in the light most favorable to the State and the State is entitled to every reasonable inference to be drawn from that evidence. Contradictions and discrepancies do not warrant dismissal of the case but are for the jury to resolve.

*State v. Teague*, \_\_\_ N.C. App. \_\_\_, \_\_\_, 715 S.E.2d 919, 923 (2011) (citation and quotation marks omitted), *disc. rev. denied*, \_\_\_ N.C. \_\_\_, 720 S.E.2d 684 (2012).

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**B. Attempted Malicious Castration**

Defendant was indicted for attempted malicious castration under N.C. Gen. Stat. § 14-28 (2007). “There are two elements to the crime of attempt: there must be the intent to commit a specific crime and an overt act which in the ordinary and likely course of events would result in the commission of the crime.” *State v. Rushing*, 61 N.C. App. 62, 67, 300 S.E.2d 445, 449 (citation omitted), *aff’d*, 308 N.C. 804, 303 S.E.2d 822 (1983). The elements of malicious castration are:

- (1) The accused must act with malice aforethought.
- (2) The act must be done on purpose and unlawfully.
- (3) The act must be done with intent to maim or disfigure a privy member of the person assaulted.
- (4) There must be permanent injury to the privy member of the person assaulted.

*State v. Beasley*, 3 N.C. App. 323, 329, 164 S.E.2d 742, 746-47 (1968) (citations omitted). Thus, to prove that defendant committed the crime of attempted malicious castration, the State must prove (1) that the accused acted with malice aforethought, (2) that the act was done on purpose and unlawfully, (3) that the act was done with the specific intent to maim or disfigure a privy member of the person assaulted, and (4) that in the ordinary and likely course of events the act would result in permanent injury to the privy member of the person assaulted. Defendant only contends that there was insufficient evidence that he committed an assault on Joseph with malice aforethought and specific intent to maim Joseph’s privy member.

Our Supreme Court has described malice as follows:

Malice has many definitions. To the layman it means hatred, ill will or malevolence toward a particular individual. To be sure, a person in such a state of mind or harboring such emotions has actual or particular malice. In a legal sense, however, malice is not restricted to spite or enmity toward a particular person. It also denotes a wrongful act intentionally done without just cause or excuse; whatever is done with a willful disregard of the rights of others, whether it be to compass some unlawful end, or some lawful end by unlawful means constitutes legal malice. It comprehends not only particular animosity but also wickedness of disposition,

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hardness of heart, cruelty, recklessness of consequences, and a mind regardless of social duty and deliberately bent on mischief, though there may be no intention to injure a particular person.

*State v. Wilkerson*, 295 N.C. 559, 578, 247 S.E.2d 905, 916 (1978) (citations and quotation marks omitted).

“Malice aforethought” means that the malice which motivated the criminal act preceded the act itself, not necessarily that defendant acted with premeditation and deliberation. *See State v. Smith*, 221 N.C. 278, 290, 20 S.E.2d 313, 320 (1942) (“It is clear, then, that the word ‘aforethought’ cannot be held to import into the definition the element of premeditation or deliberation. Indeed, it is rather definitely indicated that it relates rather to the prior existence of the malice which motivates the murder than to a previously entertained purpose.”).

Like other mental states, malice “usually cannot be proven by direct evidence, but rather must be inferred from the defendant’s acts, conduct, and inferences fairly deducible from all the circumstances.” *State v. Goldsmith*, 187 N.C. App. 162, 165, 652 S.E.2d 336, 339-40 (2007) (citation and quotation marks omitted). Especially “[i]n the domestic relation, the malice of one of the parties is rarely to be proved but from a series of acts; and the longer they have existed and the greater the number of them, the more powerful are they to show the state of the defendant’s feelings.” *State v. Scott*, 343 N.C. 313, 331, 471 S.E.2d 605, 616 (1996) (citation, quotation marks, and brackets omitted).

Here, there was conflicting evidence about how the injury to Joseph’s penis occurred. In court, Joseph testified that defendant stomped on his pelvic region, causing his pants to slide down and cut him. Joseph had previously told police that defendant had cut his penis with a knife. Detective Williams testified to Joseph’s statement about the knife. The statement was not objected to by defense counsel, nor did the trial court issue a limiting instruction as to Joseph’s prior statements to police. Those statements therefore were admitted for the truth of the matter asserted.<sup>2</sup>

Defendant’s malice and specific intent to maim, without lawful justification or excuse, could be reasonably inferred from the numer-

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2. We note that in considering a motion to dismiss “the trial court should consider all evidence actually admitted, whether competent or not, that is favorable to the State.” *State v. Jones*, 342 N.C. 523, 540, 467 S.E.2d 12, 23 (1996) (citation omitted).

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ous acts of humiliation and violence that Joseph testified he had been subjected to by defendant prior to defendant's assault on his privy member. Dr. Cooper testified that the bruises on the inside of Joseph's thighs were consistent with someone forcefully pulling the legs apart, an act normally associated with sexual abuse. Dr. Cooper further testified that "A person who hurts anybody's genitals often has gone beyond your typical just power and control, I just want to teach you a lesson. You are starting to get into a different motivation."

Joseph's testimony was consistent with this assessment. In addition to the series of assaults by fist and foot, Joseph related instances where defendant called him a " 'B' word", forced him into a dog cage and told him to act like a dog, and poured water on him to make him think that he had wet the bed. This evidence could lead a reasonable mind to conclude that defendant bore "hatred, ill will or malevolence toward" Joseph constituting actual and express malice preexisting and motivating defendant's assault on Joseph's privy member. *Wilkerson*, 295 N.C. at 578, 247 S.E.2d at 916; see *Scott*, 343 N.C. at 331, 471 S.E.2d at 616.<sup>3</sup>

Defendant argues that because the evidence only showed that he stomped on Joseph's privy member and that the scar came from Joseph's pants sliding down during that assault, a reasonable juror could not have inferred an intent to maim. Defendant need not have used a knife, however, for a reasonable juror to infer intent to maim. " 'A person of sound mind and discretion is presumed to intend the natural and probable consequences of his acts[.]' " *State v. Torain*, 316 N.C. 111, 117, 340 S.E.2d 465, 468 (quoting *Francis v. Franklin*, 471 U.S. 307, 105 S.Ct. 1965, 1969-70, 85 L.Ed. 2d 344, 351 (1985)), cert. denied, 479 U.S. 836, 107 S.Ct. 133, 93 L.Ed. 2d 77 (1986). It is reasonable for a juror to conclude that a fully grown man stomping on the privy member of an eleven year old boy would, in the likely course of events, result in disfigurement and permanent injury to the privy member and that in doing so defendant intended to cause such injury.

We conclude that this series of acts, especially their frequency, nature, and escalating level of violence, could lead a reasonable juror to conclude that defendant had malice towards Joseph prior to the assault, that such malice motivated defendant to assault Joseph's privy member, and that in doing so defendant specifically intended to disfigure his penis, either by stomping on it or by cutting him with a

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3. We do not hold that such express malice is required, only that it is sufficient.

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knife and thereby to further humiliate and emasculate him. *See Scott*, 343 N.C. at 331, 471 S.E.2d at 616. Accordingly, we find defendant's argument on this point meritless and hold that the trial court did not err in refusing to dismiss the charge of attempted malicious castration.

**C. Assault by Strangulation**

Defendant next challenges the sufficiency of the evidence with regard to assault by strangulation on two grounds. First, citing *State v. Braxton*, 183 N.C. App. 36, 643 S.E.2d 637, *disc. rev. denied*, 361 N.C. 697, 653 S.E.2d 4 (2007), defendant argues that strangulation requires a closing of the windpipe through the direct application of force to the throat, while here the evidence showed that defendant only pulled Joseph's head "back by one hand while his nose and mouth were covered by the other hand, making it difficult to breathe." Second, defendant contends that his conviction for assault by strangulation should be vacated because he was also convicted of assault inflicting serious injury for the same conduct.

In *Braxton*, we held that where the evidence showed that the defendant had "applied sufficient pressure to [the victim's] throat such that she had difficulty breathing," there was sufficient evidence to support a conviction for assault by strangulation. *Braxton*, 183 N.C. App. at 43, 643 S.E.2d at 642. We approved the trial court's instruction that "strangulation is defined as a form of asphyxia characterized by closure of the blood vessels and/or air passages of the neck as a result of external pressure on the neck brought about by hanging, ligator or the manual assertion of pressure." *Id.* at 42, 643 S.E.2d at 642 (citation omitted). We also noted other possible definitions of strangulation:

Webster's Ninth New Collegiate Dictionary defines "strangulation" as "1: the action or process of strangling or strangulating[;] 2: the state of being strangled or strangulated; [especially]: *excessive or pathological constriction or compression of a bodily tube (as a blood vessel or a loop of intestine) that interrupts its ability to act as a passage.*" Webster's Ninth New Collegiate Dictionary 1164 (9th ed.1991). "Strangle" is defined as "1a: to choke to death by compressing the throat with something (as a hand or rope): THROTTLE[;] b: to obstruct seriously or fatally the normal breathing of ... [;] c: STIFLE[.]" *Id.*

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*Id.* at 42, 643 S.E.2d at 641-42 (emphasis added).

Although the State correctly observes that in *Braxton* we did not require full closure of the air passages in the neck, *id.* at 43, 643 S.E.2d at 642, defendant does not argue that the State was required to prove that fact. Rather, defendant contends that the obstruction of the airway was caused by defendant's hand over Joseph's nose and mouth, rather than "external pressure" applied to the neck, and that therefore the action would be better classified as "smothering" than "strangling".

Joseph described this particular assault in the following exchange with the prosecutor:

[PROSECUTOR]: When Todd would knock you onto the couch, how—did that hurt?

[JOSEPH]: Huh-uh.

[PROSECUTOR]: What did it do to your breathing?

[JOSEPH]: I couldn't breathe.

[PROSECUTOR]: What was keeping you from breathing?

[JOSEPH]: His hand over my mouth and nose.

[PROSECUTOR]: Would it be possible for you, [Joseph], to show the jury the way that he held his hand up to your face?

[JOSEPH]: He was like that (indicating).

Dr. Cooper elaborated on Joseph's testimony by describing the injuries to his neck:

there is a round mark right here and there is a green mark that goes underneath the chin. It is not here on the neck, the way we classically see the strangulation, but if you have a person who is strangling a child with a hand, the part of the hand is going to be right underneath the chin, this part of your hand. The lower part of your hand will be where we classically see a strangulation mark like a person would use a rope. So if you have a child who is being strangled with a hyperextension method, meaning the head is back and the person is strangling them in this manner, the imprint of that will be very high

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on the neck. It will be just underneath the chin. And typically what we will see are just the fingerprint marks from one side of the chin to the other.

Thus, there was evidence that part of the force which inhibited Joseph's breathing during the assault was applied to the top of his throat underneath his chin, or as Dr. Cooper described it, "strangled with a hyperextension method." We do not believe that the statute requires a particular method of restricting the airways in the throat. Here, defendant constricted Joseph's airways by grabbing him under the chin, pulling his head back, covering his nose and mouth, and hyperextending his neck. Although there was no evidence that defendant restricted Joseph's breathing by direct application of force to the trachea, he managed to accomplish the same effect by hyperextending Joseph's neck and throat. The fact that defendant restricted Joseph's airway through the application of force to the top of his neck and to his head rather than the trachea itself is immaterial.

We find defendant's second argument similarly unconvincing. N.C. Gen. Stat. § 14-32.4(b) states that a defendant is guilty of assault by strangulation based on the described conduct "[u]nless the conduct is covered under some other provision of law providing greater punishment." N.C. Gen. Stat. § 14-32.4(b) (2007). This Court has held that "the language '[u]nless the conduct is covered under some other provision of law providing greater punishment' indicate[s] legislative intent to punish certain offenses at a certain level, but that *if the same conduct* was punishable under a different statute carrying a higher penalty, defendant could only be sentenced for that higher offense." *State v. Williams*, 201 N.C. App. 161, 173, 689 S.E.2d 412, 418-19 (2009) (quoting *State v. Ezell*, 159 N.C. App. 103, 111, 582 S.E.2d 679, 685 (2003)) (emphasis added). However, where a defendant is convicted of a lesser crime for one assault and a greater crime for another, this language does not preclude punishment for each separate assault, although the defendant could have been charged with the greater crime for each assault. See *State v. Roseborough*, 344 N.C. 121, 132, 472 S.E.2d 763, 770 (1996) ("The district attorney has broad discretion to determine whether to try a defendant for first-degree murder, or to try a defendant for a lesser offense[.]").

The evidence here, taken in the light most favorable to the State, supports an inference that defendant strangled Joseph as part of an assault separate from the other assaults charged. "In order for a defendant to be charged with multiple counts of assault, there must be multiple assaults. This requires evidence of a distinct interruption

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in the original assault followed by a second assault.” *State v. McCoy*, 174 N.C. App. 105, 115, 620 S.E.2d 863, 871 (2005) (citations and quotation marks omitted).

Although Joseph did not specify a date for each assault, it is reasonable to infer from his testimony that there were numerous assaults over a period of time. Joseph testified that defendant grabbed him by the neck and head in the manner described above on at least two separate occasions. Therefore, there was sufficient evidence, taken in the light most favorable to the State, that there were separate assaults with distinct interruptions, one of which could constitute an assault by strangulation. The fact that these assaults were part of a pattern of chronic abuse does not mean that they are considered one assault. Therefore, defendant’s punishment for assault by strangulation is not precluded by his convictions on more serious assault charges and we hold that the trial court did not err in denying defendant’s motion to dismiss or by declining to arrest judgment on the charge of assault by strangulation.

#### D. Multiple Counts of AWDWISI and Felony Child Abuse

As stated above, “for a defendant to be charged with multiple counts of assault, there must be multiple assaults. This requires evidence of a distinct interruption in the original assault followed by a second assault.” *McCoy*, 174 N.C. App. at 115, 620 S.E.2d at 871 (citations and quotation marks omitted). Defendant asserts that there was insufficient evidence of distinct assaults to support his convictions for the two counts of assault with a deadly weapon inflicting serious injury and three counts of felony child abuse that did not address the injury to Joseph’s privy member (one count of each was consolidated with the attempted castration charge for that injury).<sup>4</sup> We disagree.

The State here indicted defendant on multiple counts of assault and differentiated between the counts by injury. Defendant is correct that multiple injuries cannot sustain multiple counts of assault if they were inflicted as part of a single assault. *See State v. Dilldine*, 22 N.C.

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4. Defendant bases his argument entirely on the sufficiency of the evidence and does not explicitly raise double jeopardy. Nevertheless, it is important to note that the felony child abuse statute specifically states that it “is an offense additional to other civil and criminal provisions and is not intended to repeal or preclude any other sanctions or remedies.” N.C. Gen. Stat. § 14-318.4(b) (2007). Therefore, there is nothing that precludes punishment for both child abuse and assault with a deadly weapon inflicting serious injury if the evidence supports both charges. *See State v. Elliott*, 344 N.C. 242, 278, 475 S.E.2d 202, 219 (1996) (finding no error in punishing a defendant for both first degree murder and felony child abuse for the same conduct).



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App. 229, 231, 206 S.E.2d 364, 366 (1974). If, however, there is evidence that each injury was sustained in a distinct assault, it is not error to convict and punish the defendant for multiple counts.

Most of defendant's argument concerns the particular nature of the injuries alleged. For instance, he argues that because the State indicted him for assault with a deadly weapon inflicting serious injury, "to wit: blunt force trauma to the abdomen," the State was required to prove a separate assault in which blunt force trauma to the abdomen was actually suffered.

Although defendant does not directly argue that there was a fatal variance between the indictment and the proof, he contends that the State had to prove the type of injury to the part of Joseph's body specified in the indictment. Therefore, that analysis is instructive in considering whether there was sufficient evidence to support separate counts.

An indictment must set forth each of the essential elements of the offense. Allegations beyond the essential elements of the offense are irrelevant and may be treated as surplusage and disregarded when testing the sufficiency of the indictment. To require dismissal any variance must be material and substantial and involve an essential element.

*State v. Pelham*, 164 N.C. App. 70, 79, 595 S.E.2d 197, 203 (2004) (citations omitted).

Serious injury is an essential element of assault with a deadly weapon inflicting serious injury under N.C. Gen. Stat. § 14-32(b) and serious physical injury is an essential element of felony child abuse under N.C. Gen. Stat. § 14-318.4(a). *State v. Anderson*, \_\_\_ N.C. App. \_\_\_, \_\_\_, 730 S.E.2d 262, 266 (2012); *State v. Qualls*, 130 N.C. App. 1, 7, 502 S.E.2d 31, 35 (1998). The location of the injury, however, is not an essential element of either crime. We have held that a trial court properly refused to dismiss a felony child abuse charge where the indictment alleged that the assault caused a subdural hematoma when in fact it caused an *epidural* hematoma because that information was not an essential element of the crime. *Qualls*, 130 N.C. App. at 8, 502 S.E.2d at 36. Just as the level of skin on which the injury was inflicted is not an essential element, the precise location of the injury on the body is also not an essential element of felony child abuse. *See id.*

The same analysis holds true for assault with a deadly weapon inflicting serious injury. Nothing requires the State to allege the body

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part to which serious injury was inflicted and certainly not with the specificity that defendant's argument would require. *See* N.C. Gen. Stat. § 14-32(b) (2007). Language in the indictment indicating to which body part serious injury or serious bodily injury was inflicted is "irrelevant and may be treated as surplusage." *Pelham*, 164 N.C. App. at 79, 595 S.E.2d at 203.

As a result, the question is not whether the State failed to prove different assaults resulting in blunt force trauma to the head, blunt force trauma to the abdomen, and bruises about the body, but whether the State proved at least three distinct assaults in addition to the assault on Joseph's privy member.

During trial, Joseph described the following assaults:

[Prosecutor]: Were—did Todd ever hit you in your nose?

[Joseph]: He made me bleed from doing that.

THE COURT: I'm sorry?

[Joseph]: He made me bleed.

[Prosecutor]: Could you tell the jury about how that happened?

[Joseph]: He was hitting me like that (indicating).

. . . .

[Prosecutor] And when you say "bleed," would you be able to tell the jury how much blood or—

[Joseph]: That one time, that was a lot of blood.

[Prosecutor]: Do you remember when that one time was? Was it closer to when he moved in, or was it closer to when you didn't see him anymore?

[Joseph]: It was closer to when I didn't see him anymore.

[Prosecutor]: And, [Joseph], did there—was there a time when Todd began to hit you more?

[Joseph]: Before I went to the hospital.

. . . .

[Prosecutor]: [Joseph], did there come a time when you stayed home from school?

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[Joseph]: Yes.

[Prosecutor]: Could you tell the ladies and gentlemen of the jury—and don't forget to speak up—how that came about?

[Joseph] When I started getting the bruises on my face.

[Prosecutor]: And how did you get those bruises on your face?

[Joseph]: Him punching me.

[Prosecutor]: When you say "him," who are you talking about?

[Joseph]: Todd.

. . . .

[Prosecutor]: During the time that you were home, did Todd kick you?

[Joseph]: On the sides.

[Prosecutor]: Could you tell them how?

[Joseph]: He would just kick me in the sides.

[Prosecutor]: Do you know how often?

[Joseph]: (No answer.)

THE COURT: When you say "how often," are you asking how many times or on how many occasions?

[Prosecutor]: Do you remember how many times?

[Joseph]: No.

[Prosecutor]: How did it feel?

[Joseph]: Bad.

[Prosecutor]: What happened to your body as a result of him kicking you like that?

[Joseph]: Had a big bruise on the side.

[Prosecutor]: Which side?

[Joseph]: Left or right—I think left.

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Additionally, Dr. Cooper described Joseph's injuries at the time of her initial examination:

This child had numerous injuries of varying ages, but he had some specific injuries that are most concerning. He had a large bruise right next to his left nipple right over the left chest. It was a red bruise. It was relatively round. It was consistent with direct blunt force trauma injury. Because of its round nature, it was most consistent with perhaps a fist or some type of object in that manner. He also had black eyes. He had bleeding of the white of the eye on the left side. We call that a scleral hemorrhage. Scleral hemorrhages can occur from someone hitting you directly in the eye or from a strangulation injury where the blood vessels will start to pop in your eye and you can bleed on the white of the eye. He had evidence of bruises over the abdomen especially in the middle upper part of the abdomen above his belly button, and then he had a bruise that was below the belly button. Now, those were very concerning to me because the bruise below the belly button is right over the bladder, and if a person punches you hard enough over your bladder, you can cause a bladder rupture or a tear in the bladder. That can be a very serious injury. The bruise that was next to the left nipple could be a fatal injury because any time a person gets direct blunt force trauma right over the heart, which is exactly where this was located, a patient can have a heart arrhythmia, the beats can get messed up and the patient can have an arrhythmic heart condition that causes you to just completely drop dead. That has been well described in athletes who get something like a basketball or something or football that hits them in the chest. The other thing about this child is that he had multiple bruises up and down both arms, and he had bruises especially on his knees, especially the left knee. In fact, the left knee was a little bit swollen as compared to the right knee, and the bruises on his left knee were a little bit more resolved. . . . On the buttocks, he had old pinpoint injuries that we could see but no injuries that would be typical for classic corporal punishment, no stripes that you might see for belt marks or things of

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that nature, which is always important for us to document, but instead, more direct blunt force trauma injuries.

Dr. Cooper's testimony supports the inference of multiple assaults not because of the number of injuries, but because he described the injuries in different stages of healing—some old, some new.

As to the fourth felony child abuse charge, one not paired with an assault with a deadly weapon inflicting serious injury charge, Joseph described the following assault:

[Prosecutor]: And Todd told you you were grounded for a month?

[Joseph]: Yes.

[Prosecutor]: And did you say anything about wanting to be grounded?

[Joseph]: I told him I didn't want to be grounded anymore.

[Prosecutor]: And what did he do then?

[Joseph]: Hit me with a bamboo stick.

[Prosecutor]: And where did that take place?

[Joseph]: Outside.

[Prosecutor]: What type of bamboo stick was it?

[Joseph]: A tiki stick, bamboo.

[Prosecutor]: Is that like a tiki torch that you put in the backyard that has a candle in it?

[Joseph]: Yes.

[Prosecutor]: Do you remember which end of the tiki torch he used?

[Joseph]: The one where you put the candle at.

. . . .

[Prosecutor]: How did you know it was ten times?

[Joseph]: Because that's how much he said he was going to hit me with.

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[Prosecutor]: So he told you before he did it that he was going to hit you ten times?

[Joseph]: Yes.

Our Supreme Court has previously stated that

a child's uncertainty as to the time or particular day the offense charged was committed goes to the weight of the testimony rather than its admissibility, and nonsuit may not be allowed on the ground that the State's evidence fails to fix any definite time when the offense was committed where there is sufficient evidence that the defendant committed each essential act of the offense.

*State v. Effler*, 309 N.C. 742, 749, 309 S.E.2d 203, 207 (1983) (citation omitted). Although not perfectly clear from Joseph's testimony, in context of the overall narrative and in the light most favorable to the State, it would be reasonable to infer that these instances occurred separately from each other with distinct interruptions between them. Therefore, they could form the basis of separate assault counts. *See McCoy*, 174 N.C. App. at 115, 620 S.E.2d at 871. The fact that these assaults form part of chronic and continual abuse does not change that conclusion.

#### E. Conclusion

We hold that the trial court did not err in denying defendant's motion to dismiss because there was sufficient evidence of each element of every crime charged and evidence that defendant was the perpetrator.

#### III. Closed Circuit Television Testimony

[2] Defendant next argues that the trial court erred by granting the State's motion to allow Joseph to testify outside his presence via closed-circuit television ("CCTV"), thereby violating his rights under the State and Federal constitutions to confront his accuser, and that the evidence did not support the trial court's findings of fact under N.C. Gen. Stat. § 15A-1225.1 (2011) in deciding to allow Joseph to testify via CCTV.

The trial court allowed Joseph to testify in the presence of the jury and attorneys, but made defendant go to another room where he could watch the proceedings on closed circuit television. There was a phone in the room so that defendant could cause a signal to flash on the phone on defense counsel's table to indicate he wished to speak

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with his attorney. Defendant's trial counsel had a full opportunity to cross-examine Joseph when he was on the stand. Defendant was able to observe the proceedings in real time.

Defendant's constitutional argument has already been decided by this Court in *State v. Jackson*, \_\_\_ N.C. App. \_\_\_, 717 S.E.2d 35 (2011), *disc. rev. denied*, \_\_\_ N.C. \_\_\_, 720 S.E.2d 681 (2012), *cert. denied*, \_\_\_ U.S. \_\_\_, 133 S.Ct. 164 (2012). In *Jackson*, we held that where "trial testimony was subjected to rigorous adversarial testing . . . effective confrontation was preserved, and the use of one-way CCTV to procure [the juvenile witness'] evidence did not offend the Constitution, despite the lack of face-to-face confrontation." *Jackson*, \_\_\_ N.C. App. at \_\_\_, 720 S.E.2d at 40. Defendant does not contend that his ability to confront his accuser was inhibited in any way other than the use of CCTV. *Jackson* is binding on this Court and we apply it here. *In re Civil Penalty*, 324 N.C. 373, 384, 379 S.E.2d 30, 37 (1989). Therefore, as in *Jackson*, we hold that his rights under the Sixth Amendment's Confrontation Clause and the North Carolina Constitution were not violated.

Defendant also argues that the trial court's findings of fact underlying his decision to permit use of CCTV were not supported by the evidence. N.C. Gen. Stat. § 15-1225.1 permits a juvenile under the age of 16 to testify through CCTV when the trial court finds: "(1) That the child witness would suffer serious emotional distress, not by the open forum in general, but by testifying in the defendant's presence, and (2) That the child's ability to communicate with the trier of fact would be impaired." N.C. Gen. Stat. § 15-1225.1 (2011).

Here, the trial court made the following findings of fact and conclusions of law:

The child victim has suffered severe and continuing psychological harm from the abuse alleged to have been caused by the defendant;

Two, the child's emotional distress is more than de minimis;

Three, the child exhibits intense fear of the defendant;

Four, the child is more likely to effectively communicate without the defendant's physical presence;

Five, the significant progress made by the child would be jeopardized by having to testify in the defendant's presence;

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Six, the child would be traumatized by the defendant's presence;

Seven, that trauma would impair the child's ability to communicate;

Eight, technology exists to provide two-way closed-circuit video testimony of the child providing full opportunity for contemporaneous cross-examination of the child by the defendant's counsel, in view of the judge, the jury and the defendant.

In consideration of the foregoing, the Court makes the following conclusions of law:

One, the child is likely to suffer emotional and psychological harm from testifying in the defendant's presence;

Two, denial of physical, face-to-face confrontation is necessary to protect the well-being of the child;

Three, public policy requires protection of the child's physical, emotional and psychological help;

Four, denial of a physical, face-to-face confrontation is necessary to further the public policy interest of the State;

Five, the State's transcendent interest in the welfare of the victim is sufficient to outweigh the defendant's right to face his accuser under the unique facts of this case;

Six, procedures under which the child will be examined are sufficient to protect the rights of the defendant as limited by the State's interest in the child's welfare under the unique facts of this case.

Therefore, the motion is allowed.

There was only one witness who testified during the hearing held by the trial court on this issue: Janet Cheek, a licensed clinical social worker and psychotherapist with years of training and experience in providing therapy to young victims of trauma. Ms. Cheek had worked with Joseph after he was removed from his mother's home. The prosecutor asked Ms. Cheek, "What is your opinion with regard to Joseph's ability to effectively and accurately testify about what happened to him in the presence of Todd Lanford?" Ms. Cheek responded:



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I think that all progress that he's made in therapy would be at risk of him losing ground in his therapeutic movement forward. I think that he is—has reported repeatedly that he is terrified of Todd Lanford. I think that he would be at risk of not being able to have fluid—the ability to be able to report in a fluid the—all of the details and events of—of the week in question and the chronic events of the abuse that he's reported prior to the week in question; and, I think that he would be at risk of decompensation both in the courtroom and also decompensation of any therapeutic progress that he's made as a young teenager, and also in the ability to be able to function in the family structure that he's established.

The prosecutor then asked, "Okay. Given that you indicated to him that he would be protected in the courtroom, what is your assessment of that allaying his fears of Todd?" Ms. Cheek answered,

He's still terrified. . . . I think that he would not effectively be able to testify in a courtroom if he had to face Todd. I think that he wants to be able to—to say what he needs to say, but I don't think that he would effectively be able to testify if he has to see Todd and/or see his mother for the first time. He has not been able to see his mother for a long period of time. I think either—either circumstance would be devastating.

Ms. Cheek further elaborated on re-direct,

I believe that it would do him grave harm emotionally, and I don't—do not believe that he would be able to be as effective in front of the defendant as he would be behind either the judge's chambers or in—with closed circuit TV. I just do not believe that he would be able to provide as efficient and effective testimony.

Defendant argues that because Ms. Cheek opined only that there was a "risk" of decompensation or psychological harm, the evidence did not support the trial court's fifth and sixth findings that the juvenile would be traumatized and that his progress would be jeopardized by having to testify in defendant's presence. We note first that on re-direct examination Ms. Cheek did state outright that, in her opinion, testifying face-to-face with defendant "would do him grave harm emotionally." Her testimony was not required to conform to the lan-

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guage of the statute in order to support a factual finding that does. “We must not put form over substance; we must not return to strict legalism and require magic words chanted in precise sequence to make an act right.” *State v. Jernigan*, 118 N.C. App. 240, 245, 455 S.E.2d 163, 167 (1995). We hold that the above testimony supports the trial court’s findings of fact and that those findings of fact, in turn, support the trial court’s conclusions of law. We therefore find no error in the trial court’s decision to grant the State’s motion to permit Joseph to testify via CCTV.

**IV. Conclusion**

In summary, we find no error in the trial court’s decisions to deny defendant’s motion to dismiss all charges against him, and no error in the court’s decision to permit the juvenile witness to testify against defendant via CCTV.

NO ERROR.

Judges McGEE and HUNTER, JR., Robert N. concur.

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STATE OF NORTH CAROLINA

v.

BOBBY LEE McKENZIE

No. COA12-436

Filed 15 January 2013

**1. Constitutional Law—double jeopardy—driving while impaired—commercial driver’s license revocation**

Defendant’s prosecution for driving while impaired (DWI) subsequent to a commercial driver’s license disqualification under N.C.G.S. § 20-17.4 constituted impermissible double jeopardy. Based on the factors in *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, N.C.G.S. § 20-17.4 is so punitive that it becomes a criminal punishment and defendant cannot subsequently face prosecution for DWI.

**2. Constitutional Law—due process—mootness—no available remedy**

Defendant’s due process claim was moot because he had no available remedy. The subject of the claim was defendant’s one-

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year commercial driver's license (CDL) disqualification under N.C.G.S. § 20-17.4, the disqualification had terminated, nothing in the record indicated that defendant was currently disqualified from holding a CDL, and defendant did not contend that collateral legal consequences were expected.

Judge HUNTER, Robert C. dissenting

Appeal by defendant from order entered 13 March 2012 by Judge Phyllis M. Gorham in Duplin County Superior Court. Heard in the Court of Appeals 10 October 2012.

*Attorney General Roy Cooper, by Assistant Attorney General Christopher W. Brooks, for the State.*

*Hunter & Price, P.A., by Justin B. Hunter and G. Braxton Price, for defendant-appellant.*

*Tin Fulton Walker & Owen, PLLC, by Noell P. Tin, Matthew G. Pruden, and Jacob H. Sussman, for North Carolina Advocates for Justice, amicus curiae.*

HUNTER, JR., Robert N., Judge.

Bobby McKenzie ("Defendant") appeals an order (i) reversing the District Court's order that dismissed his Driving While Impaired ("DWI") charge; (ii) reinstating his DWI charge; and (iii) remanding his case for trial. Defendant contends the trial court erred because (i) prosecution for DWI subjects him to double jeopardy; and (ii) disqualification of his commercial driver's license ("CDL") violated his substantive and procedural due process rights. Upon review, we reverse the trial court's decision.

### **I. Facts & Procedural History**

Defendant was a commercial truck driver for KBJ Logging ("KBJ") in Wallace. On 9 July 1996, Defendant applied for a Class A CDL under N.C. Gen. Stat. §§ 20-4.01(2a) and 20-4.01(3d). He successfully completed all tests required by the North Carolina Department of Motor Vehicles ("DMV"). The DMV issued Defendant a Class A CDL on 9 August 1996. Defendant renewed his CDL on 21 March 2000, 24 March 2005, and 24 March 2010. On 4 July 2010, Defendant had a valid Class A CDL.

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In the early hours of 4 July 2010, Defendant was driving a non-commercial motor vehicle. At approximately 1:10 AM, Defendant submitted to a show of authority by Trooper D.M. Rich (“Rich”) of the North Carolina State Highway Patrol. Rich arrested Defendant for (i) driving left of center (N.C. Gen. Stat. § 20-146 (2011)), and (ii) DWI (N.C. Gen. Stat. § 20-138.1 (2011)). At Rich’s request, Defendant took two Intoxilyzer EC/IR-II breath tests at 2:37 AM and 2:40 AM. Both tests indicated Defendant had a blood alcohol concentration of 0.08 or higher.

Defendant appeared before Duplin County Magistrate Albert Alabaster (“Alabaster”) later that night. Based on the breath test results, Alabaster issued a Revocation Order When Person Present (the “Revocation Order”) pursuant to N.C. Gen. Stat. § 20-16.5.<sup>1</sup> He then seized Defendant’s CDL. The Revocation Order “remain[ed] in effect at least thirty (30) days” from its issuance. According to the Revocation Order, Defendant could reclaim his license at the end of the thirty-day period if he paid a \$100.00 civil revocation fee to the Duplin County Clerk of Superior Court. The Revocation Order also described Defendant’s “right to a hearing to contest the validity of this Revocation before a magistrate or judge. To do so, a written request must be made within ten (10) days of the effective date of the revocation.” Nothing in the record indicates Defendant contested the 30-day revocation.

On 20 July 2010, the DMV sent Defendant a letter informing him that, effective 4 July 2010, his CDL was disqualified for one year. The letter referenced N.C. Gen. Stat. § 20-17.4(a)(7), which states if an individual has “[a] civil license revocation under G.S. 20-16.5 . . . arising out of a charge that occurred . . . while the person was holding a commercial drivers license[,]” the individual is disqualified from driving a commercial vehicle for one year. The letter also said “[a] hearing is not authorized by statute.”

On 5 August 2010, Defendant went to the Duplin County Clerk of Superior Court’s Office, paid the civil revocation fee, and retrieved his Class A CDL. However, under N.C. Gen. Stat. § 20-17.4(a)(7) he was still disqualified from driving a commercial vehicle until 4 July 2011.

After his commercial driving disqualification, Defendant became a logger for KBJ instead of a truck driver. KBJ cut his pay in half.

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1. N.C. Gen. Stat. § 20-16.5 states “a person’s driver’s license is subject to revocation under this section if . . . [th]e person has . . . [a]n alcohol concentration of 0.08 or more at any relevant time after driving.” N.C. Gen. Stat. § 20-16.5(b1) (2011).

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A few months later, KBJ fired Defendant because its logging crews were overstaffed.

On 25 August 2011, Defendant filed a motion to dismiss his DWI charge due to: (i) due process violations; (ii) double jeopardy violations; and (iii) equal protection violations. On 6 September 2011, the Duplin County District Court granted his motion based on: (i) due process violations; and (ii) double jeopardy violations. The State timely appealed to Duplin County Superior Court. On 13 March 2012, the Duplin County Superior Court entered an order (i) reversing the District Court's order; (ii) reinstating Defendant's DWI charge; and (iii) remanding the case to District Court for further proceedings. The Superior Court's order also certified that "an appeal of this Order is appropriately justiciable in the appellate division as an interlocutory matter" pursuant to N.C. Gen. Stat. § 15A-1432(d). Defendant filed timely notice of appeal on 19 March 2012.

**II. Jurisdiction & Standard of Review**

This Court has jurisdiction to hear the instant appeal pursuant to N.C. Gen. Stat. §§ 15A-1432(d) and 7A-27(d) (2011).

If the superior court finds that a judgment, ruling, or order dismissing criminal charges in the district court was in error, . . . [t]he defendant may appeal this order to the appellate division . . . by an interlocutory appeal if the defendant, or his attorney, certifies to the superior court judge who entered the order that the appeal is not taken for the purpose of delay and if the judge finds the cause is appropriately justiciable in the appellate division as an interlocutory matter.

N.C. Gen. Stat. § 15A-1432(d) (2011). Although the present appeal is interlocutory, it is reviewable under N.C. Gen. Stat. § 7A-27(d) because it affects "substantial rights." *See State v. Major*, 84 N.C. App. 421, 422, 352 S.E.2d 862, 863 (1987) ("[A] defendant's right not to be unconstitutionally subjected to multiple criminal trials for the same offense is a substantial right."); *State v. Johnson*, 95 N.C. App. 757, 758, 383 S.E.2d 692, 693 (1989) (holding an interlocutory appeal in a criminal case is reviewable when it raises a due process claim).

"The standard of review for alleged violations of constitutional rights is *de novo*." *State v. Graham*, 200 N.C. App. 204, 214, 683 S.E.2d 437, 444 (2009), *appeal dismissed and disc. review denied*, 363 N.C. 857, 694 S.E.2d 766 (2010); *see also Piedmont Triad Reg'l Water*

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*Auth. v. Sumner Hills Inc.*, 353 N.C. 343, 348, 543 S.E.2d 844, 848 (2001) (“[D]e novo review is ordinarily appropriate in cases where constitutional rights are implicated.”). “ ‘Under a *de novo* review, the court considers the matter anew and freely substitutes its own judgment’ for that of the lower tribunal.” *State v. Williams*, 362 N.C. 628, 632-33, 669 S.E.2d 290, 294 (2008) (quoting *In re Greens of Pine Glen Ltd.*, 356 N.C. 642, 647, 576 S.E.2d 316, 319 (2003)).

“[A]s a general rule this Court will not hear an appeal when the subject matter of the litigation has been settled between the parties or has ceased to exist.” *Kendrick v. Cain*, 272 N.C. 719, 722, 159 S.E.2d 33, 35 (1968).

Before determining whether an appeal is moot when the defendant has completed his sentence, it is necessary to determine whether collateral legal consequences of an adverse nature may result. ‘[W]hen the terms of the judgment below have been fully carried out, if collateral legal consequences of an adverse nature can reasonably be expected to result therefrom, then the issue is not moot and the appeal has continued legal significance.’

*State v. Black*, 197 N.C. App. 373, 375-76, 677 S.E.2d 199, 201 (2009) (quoting *In re Hatley*, 291 N.C. 693, 694, 231 S.E.2d 633, 634 (1977)) (alteration in original).

**III. Analysis**

On appeal, Defendant makes two arguments: (i) the trial court erred because his DWI prosecution constitutes double jeopardy; and (ii) the trial court erred because his one-year CDL disqualification under N.C. Gen. Stat. § 20-17.4(a)(7) violated his procedural and substantive due process rights. Upon review, we reverse the trial court’s decision.

**A. Double Jeopardy**

**[1]** Defendant first argues the trial court erred because prosecuting him for DWI subjects him to double jeopardy. Specifically, he argues that his prior one-year CDL disqualification under N.C. Gen. Stat. § 20-17.4(a)(7) constitutes a prior criminal punishment. We agree.

The Fifth Amendment of the United States Constitution provides that no person shall “be subject for the same offense to be twice put in jeopardy of life or limb.” U.S. Const. amend. V; *see also Benton v. Maryland*, 395 U.S. 784, 795 (1969) (incorporating the Fifth Amendment’s

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Double Jeopardy Clause against the states through the Fourteenth Amendment). “The Law of the Land Clause incorporates similar protections under the North Carolina Constitution.” *State v. Evans*, 145 N.C. App. 324, 326–27, 550 S.E.2d 853, 856 (2001) (quotation marks omitted) (quoting *State v. Oliver*, 343 N.C. 202, 205, 470 S.E.2d 16, 18 (1996)); see N.C. Const. art. I, § 19.

Accordingly, an individual cannot face multiple criminal punishments for the same offense. See *State v. Gardner*, 315 N.C. 444, 451, 340 S.E.2d 701, 707 (1986). However, the Double Jeopardy Clause does not protect against receiving both a civil penalty and a criminal punishment for the same offense. See *State v. Wagoner*, 199 N.C. App. 321, 332, 683 S.E.2d 391, 400 (2009). Furthermore, “[a]n Act found to be civil cannot be deemed punitive as applied to a single individual in violation of the Double Jeopardy . . . clause because the impact on a single defendant is irrelevant in a double jeopardy analysis.” *State v. Reid*, 148 N.C. App. 548, 552, 559 S.E.2d 561, 564 (2002) (quotation marks and citation omitted) (alterations in original).

In *Hudson v. United States*, the U.S. Supreme Court outlined a two-part test to determine whether a punishment is criminal or civil. 522 U.S. 93, 99 (1997). First, “[a] court must . . . ask whether the legislature, ‘in establishing the penalizing mechanism, indicated either expressly or impliedly a preference for one label or the other.’” *Id.* (quoting *United States v. Ward*, 448 U.S. 242, 248 (1980)). This portion of the *Hudson* test is “a matter of statutory construction.” *Id.* (citing *Helvering v. Mitchell*, 303 U.S. 391, 399 (1938)). If the legislature indicated the punishment is criminal, then the Double Jeopardy Clause applies. See *id.*

Under the second portion of the *Hudson* test, “[e]ven in those cases where the legislature has indicated an intention to establish a civil penalty, we have inquired further whether the statutory scheme was so punitive either in purpose or effect as to transfor[m] what was clearly intended as a civil remedy into a criminal penalty[.]” *Id.* (internal citations and quotation marks omitted) (second alteration in original). Thus, a civil penalty can have such a punitive effect that it becomes a criminal punishment for double jeopardy purposes.

To determine whether a civil penalty is so punitive that it becomes a criminal punishment, we examine seven factors:

- (1) [w]hether the sanction involves an affirmative disability or restraint;

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- (2) whether it has historically been regarded as a punishment;
- (3) whether it comes into play only on a finding of *scienter*;
- (4) whether its operation will promote the traditional aims of punishment - retribution and deterrence;
- (5) whether the behavior to which it applies is already a crime;
- (6) whether an alternative purpose to which it may rationally be connected is assignable for it; and
- (7) whether it appears excessive in relation to the alternative purpose assigned.

*Id.* at 99-100 (alteration in original) (quotation marks omitted) (quoting *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168-169 (1963)). When we analyze these factors, “no one factor should be considered controlling.” *Id.* at 101. Furthermore, “only the clearest proof [of these factors] will suffice to override legislative intent and transform what has been denominated a civil remedy into a criminal penalty.” *Id.* at 100 (quotation marks and citation omitted).

North Carolina courts have previously applied this type of analysis to 30-day license revocations under N.C. Gen. Stat. § 20-16.5 in *Oliver*, 343 N.C. 202, 470 S.E.2d 16, *Evans*, 145 N.C. App. 324, 550 S.E.2d 853, and *Reid*, 148 N.C. App. 548, 559 S.E.2d 561.

In *Oliver*, our Supreme Court decided whether a 10-day license revocation after a DWI arrest subjected an individual to a double jeopardy violation. *Oliver*, 343 N.C. at 210, 470 S.E.2d at 21; *see* N.C. Gen. Stat. § 20-16.5 (2011). There, our Supreme Court held no double jeopardy violation occurred because the revocation was only a civil remedial sanction. *Id.* at 210, 470 S.E.2d at 21.

In *Evans*, this court considered whether an amended version of N.C. Gen. Stat. § 20-16.5 requiring a thirty-day revocation constituted a double jeopardy violation. 145 N.C. App. at 325, 550 S.E.2d at 855. In that case, we applied the *Hudson* test to determine “N.C.G.S. § 20-16.5 is neither punitive in purpose nor effect[.]” *Id.* at 334, 550 S.E.2d at 860. However, we cautioned:

[a]lthough we find no punitive purpose on the face of N.C.G.S. § 20-16.5, we are aware that, at some point, a



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further increase in the revocation period by the General Assembly becomes excessive, even when considered in light of the well-established goals of N.C.G.S. § 20-16.5. Whether it is a further doubling or tripling of the revocation period, there is a point at which the length of time can no longer serve a legitimate remedial purpose, and the revocation provision could indeed violate the Double Jeopardy Clause.

*Id.* at 332, 550 S.E.2d at 859.

In *Reid*, this Court considered the same version of N.C. Gen. Stat. § 20-16.5 as in *Evans*, but as applied to a CDL revocation. 148 N.C. App. at 550, 559 S.E.2d at 562. There we held that “[a]n Act found to be civil cannot be deemed punitive as applied to a single individual in violation of the Double Jeopardy clause because the impact on a single defendant is irrelevant in a double jeopardy analysis.” *Id.* at 552, 559 S.E.2d at 564 (quotation marks and citation omitted) (alteration in original). We thus held, in accordance with *Evans*, no double jeopardy violation occurred. *See id.* at 553–54, 559 S.E.2d at 564–65.

In the present case, Defendant argues his prosecution for DWI subjects him to double jeopardy because his CDL was already revoked for one year under N.C. Gen. Stat. § 20-17.4. In this case of first impression, we now apply the *Hudson* two-part test to determine whether Defendant’s CDL disqualification is a prior criminal punishment. We distinguish our analysis of N.C. Gen. Stat. § 20-17.4 in the instant case from our analysis of N.C. Gen. Stat. § 20-16.5 in *Oliver*, *Evans*, and *Reid*.

Under the first portion of the *Hudson* test, driver’s license revocations are not expressly or impliedly criminal in nature. *See Oliver*, 343 N.C. at 207, 470 S.E.2d at 20 (“Historically, this Court has long viewed drivers’ license revocations as civil, not criminal, in nature.”); *Seders v. Powell*, 298 N.C. 453, 462, 259 S.E.2d 544, 550 (1979) (“[R]evocation proceedings are civil because they are not intended to punish the offending driver but to protect other members of the driving public.”); *Joyner v. Garrett*, 279 N.C. 226, 234, 182 S.E.2d 553, 559 (1971) (“Proceedings involving the suspension or revocation of a license to operate a motor vehicle are civil and not criminal in nature, and the revocation of a license is no part of the punishment for the crime for which the licensee was arrested.”).

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Still, by applying the *Kennedy* factors outlined in the second portion of the *Hudson* test, we conclude N.C. Gen. Stat. § 20-17.4 is so punitive it becomes a criminal punishment.

Defendant concedes the first three *Kennedy* factors do not support a finding that N.C. Gen. Stat. § 20-17.4 constitutes a criminal punishment. Under the first *Kennedy* factor, since license revocation does not “approach[] the infamous punishment of imprisonment,” it does not “involve[] an affirmative disability or restraint.” *Hudson*, 522 U.S. at 104 (quotation marks and citation omitted); see *Evans*, 145 N.C. App. at 332, 550 S.E.2d at 859. Under the second *Kennedy* factor, license revocation has not historically been viewed as punishment. See *id.* at 333, 550 S.E.2d at 859. Rather, punishment has historically been addressed by the DWI criminal statutes. See *id.* “Moreover, revocation of a privilege voluntarily given, such as a driver’s license in this case, is characteristically free of the punitive element.” *Id.* (citation and quotation marks omitted). Under the third *Kennedy* factor, sciencer is not an element of the CDL disqualification provisions of N.C. Gen. Stat. § 20-17.4. See *id.* at 333, 550 S.E.2d at 859-60.

Nonetheless, the remaining four *Kennedy* factors support the conclusion that N.C. Gen. Stat. § 20-17.4 is so punitive it becomes a criminal punishment.

Under the fourth *Kennedy* factor, N.C. Gen. Stat. § 20-17.4 “promote[s] the traditional aims of punishment—retribution and deterrence.” *Hudson*, 522 U.S. at 99. Our analysis in the instant case differs from our analysis of the 10-day license revocation in *Oliver* and the 30-day license revocation in *Evans*. In *Oliver* and *Evans*, we acknowledged that license revocation has a retributive and deterrent effect. *Oliver*, 343 N.C. at 209, 470 S.E.2d at 21 (“We do not pretend to ignore that a driver’s license revocation, even of short duration, may, for some, have a deterrent effect.”); *Evans*, 145 N.C. App. at 333-34, 550 S.E.2d at 860 (“We acknowledge that [license revocation] operates as a deterrent to driving while impaired.”). On balance, however, the *Oliver* and *Evans* courts held “any deterrent effect a driver’s license revocation may have upon the impaired driver is merely incidental to the overriding purpose of protecting the public’s safety.” *Evans*, 145 N.C. App. at 333, 550 S.E.2d at 860 (quoting *Oliver*, 343 N.C. at 209-10, 470 S.E.2d at 21). In reaching this conclusion, those courts emphasized the short-term nature of the license revocation. See *Oliver*, 343 N.C. at 209, 470 S.E.2d at 21 (“[T]he ten-day driver’s license revocation . . . [is] neither [an] excessive nor overwhelmingly dispropor-

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tionate response[] to the immediate dangers an impaired driver poses to the public and himself. . . . [S]wift action is required to remove the unfit driver from the highways in order to protect the public.”). Here, given the substantial length of the one-year disqualification, we reach the opposite conclusion: any remedial purpose behind N.C. Gen. Stat. § 20-17.4 is incidental to its deterrent and retributive goals.

*Short-term* license revocation does have a primary remedial purpose. It immediately removes drunk drivers from the road while they are incapacitated and “serves as an interim highway safety measure until after a person is afforded a trial.” *Henry v. Edmisten*, 315 N.C. 474, 489-90, 340 S.E.2d 720, 731 (1986). One-year CDL disqualification, on the other hand, does not primarily serve the same purpose. While it may have some remedial effect, we conclude the main purpose of such a lengthy disqualification period is to deter drunk driving. N.C. Gen. Stat. § 20-17.4 serves to let “persons who choose to drive while impaired know that if their actions are observed by law enforcement, they will be charged with DWI and face a temporary license revocation.” *Evans*, 145 N.C. App. at 333, 550 S.E.2d at 860.

We acknowledge that in *Reid*, we held a 30-day CDL revocation primarily served a remedial purpose because “the state has a greater interest in the public’s safety regarding commercial drivers because there exists a greater risk of harm.” 148 N.C. App. at 553, 559 S.E.2d at 564. However, given the substantial length of CDL disqualification under N.C. Gen. Stat. § 20-17.4, we do not find this argument dispositive. Here, one-year CDL disqualification primarily serves a punitive and deterrent purpose.

Under the fifth *Kennedy* factor, the State appropriately concedes drunk driving, the underlying behavior covered by N.C. Gen. Stat. § 20-17.4, is already a crime. *See Evans*, 145 N.C. App. at 334, 550 S.E.2d at 860.

“The final two factors under the *Kennedy* analysis require us to decide whether there is a remedial purpose behind [N.C. Gen. Stat. § 20-17.4], and if so, whether the statute is excessive in relation to the remedial purpose.” *Id.*

Any license revocation or suspension based on DWI arrest serves, *inter alia*, the remedial purpose of “removing impaired drivers from the highway while they are a risk to themselves and others.” *Id.* The merits of this goal are undeniably laudable. Indeed, “[t]he carnage caused by drunk drivers is well documented and needs no detailed recitation here.” *South Dakota v. Neville*, 459 U.S. 553, 558 (1983).

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However, a one-year CDL disqualification is excessive in relation to this remedial purpose.

In *Evans*, we held a 30-day license revocation is not excessive. 145 N.C. App. at 334, 550 S.E.2d at 860. However, we also cautioned that:

at some point, a further increase in the revocation period by the General Assembly becomes excessive, even when considered in light of the well-established goals of N.C.G.S. § 20-16.5. Whether it is a further doubling or tripling of the revocation period, there is a point at which the length of time can no longer serve a legitimate remedial purpose, and the revocation provision could indeed violate the Double Jeopardy Clause.

*Id.* at 332, 550 S.E.2d at 859. In the case at hand, there is not merely a “doubling or tripling,” but rather a twelvefold increase in the disqualification period. We conclude this has become excessive in relation to any remedial purpose behind N.C. Gen. Stat. § 20-17.4.

Based on our review of the *Kennedy* factors, we thus conclude N.C. Gen. Stat. § 20-17.4 is so punitive that it becomes a criminal punishment. Therefore, prosecution for DWI subsequent to license disqualification under N.C. Gen. Stat. § 20-17.4 constitutes impermissible double jeopardy. *See Hudson*, 522 U.S. at 99.

**B. Due Process**

[2] Defendant next argues his one-year CDL disqualification under N.C. Gen. Stat. § 20-17.4 violated his due process rights. Upon review, we conclude Defendant’s due process claim is moot.

We will consider a matter moot when “the subject matter of the litigation has been settled between the parties or has ceased to exist.” *Kendrick*, 272 N.C. at 722, 159 S.E.2d at 35. *But cf. Black*, 197 N.C. App. at 375–76, 677 S.E.2d at 201 (holding a claim is not moot when “collateral legal consequences of an adverse nature” are expected). In this regard, a claim is moot when the claimant has no available remedy. *See Roberts v. Madison Cnty. Realtors Ass’n*, 344 N.C. 394, 398–99, 474 S.E.2d 783, 787 (1996) (“A case is ‘moot’ when a determination is sought on a matter which, when rendered, cannot have any practical effect on the existing controversy. . . . Thus, the case at bar is moot if [an intervening event] had the effect of leaving plaintiff with no available remedy.”).

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Here, the subject of Defendant's due process claim is his one-year CDL disqualification under N.C. Gen. Stat. § 20-17.4. The disqualification became effective 4 July 2010 and terminated 4 July 2011. Nothing in the record indicates Defendant is currently disqualified from holding a CDL. Furthermore, Defendant does not contend any "collateral legal consequences" are expected. *See Black*, 197 N.C. App. at 375-76, 677 S.E.2d at 201. We therefore conclude Defendant's due process claim is moot because he has no available remedy. *See State v. Stover*, 200 N.C. App. 506, 509-10, 685 S.E.2d 127, 130-31 (2009) (holding a claim involving criminal sentencing was moot because the defendant had already served the sentence); *In re Swindell*, 326 N.C. 473, 474-75, 390 S.E.2d 134, 135 (1990) (holding a juvenile's appeal of a trial court order sending him to a "training school" was moot because he had already been released from the school).

Although Defendant's due process claim is moot, we believe N.C. Gen. Stat. § 20-17.4 raises due process concerns because it does not afford defendants any opportunity for a hearing. Nonetheless, in the absence of a justiciable claim, it is the role of the state legislature, not this Court, to remedy constitutionally suspect statutes. Therefore, we decline to further address the substantive merits of Defendant's due process claim.

**IV. Conclusion**

We conclude the one-year disqualification of a CDL under N.C. Gen. Stat. § 20-17.4 is so punitive it becomes a criminal punishment, subjecting Defendant to double jeopardy. Consequently, Defendant cannot subsequently face prosecution for DWI. We further conclude Defendant's due process claim is moot because his one-year CDL disqualification has expired. Based on our double jeopardy determination, the trial court's decision is

REVERSED.

Judge CALABRIA concurs.

Judge HUNTER, Robert C. dissents in a separate opinion.

HUNTER, Robert C., Judge, dissenting.

Because I conclude that defendant's prosecution for Driving While Impaired ("DWI") does not subject him to double jeopardy under the two-part test set out in *Hudson v. United States*, 522 U.S.

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93, 99-100, 139 L. Ed. 2d 450, 492-93 (1997), I must respectfully dissent. I would affirm the Superior Court's order on the issue of double jeopardy. However, since defendant's due process claim should be raised in a civil action, not in the present criminal action against him, I do not believe the Superior Court had jurisdiction to consider this claim. Thus, I would reverse the Superior Court order as it relates to defendant's due process claim and remand the matter back to the Superior Court for entry of an order consistent with this opinion.

**Background**

Pursuant to N.C. Gen. Stat. § 20-7(a)(2), (i) and § 20-37.13, defendant held a Class A Commercial Driver's license ("CDL"), issued to him on 9 August 1996. Defendant renewed his CDL in 2000, 2005, and 2010.

On 4 July 2010, defendant was operating a noncommercial motor vehicle and was pulled over by North Carolina State Highway Patrol Officer D.M. Rich. Defendant submitted to a chemical test of his breath. Officer Rich took defendant before Magistrate Albert Alabaster who issued a "Revocation Order When Person Present" pursuant to N.C. Gen. Stat. § 20-16.5. Defendant's CDL was revoked for 30 days based on the Magistrate's finding that defendant had an alcohol concentration of 0.08 or more.<sup>1</sup> After the expiration of 30 days, defendant could reclaim his driver's license by paying a \$100 civil revocation fee to the Duplin County Clerk of Superior Court. At the bottom of the Revocation Order, it explained defendant's right to have a hearing if he wanted to contest the validity of the revocation. To do so, defendant was required to request a hearing within ten days of the effective date of revocation. There is no indication that defendant exercised this right.

On 20 July 2010, the Division of Motor Vehicles ("DMV") sent defendant a notice informing him that his CDL would be automatically disqualified for a period of one year pursuant to N.C. Gen. Stat. § 20-17.4(a)(7). The notice also stated that defendant was not entitled to a hearing on the disqualification.

On 25 August 2011, defendant filed a motion to dismiss his criminal DWI charge for three reasons. First, defendant contended that the failure to provide him with a procedural mechanism to challenge his CDL disqualification violated his procedural and substantive due process rights. Second, defendant argued that the civil revocation of

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1. Before the Superior Court, the parties attested, in their undisputed findings of fact, that the Magistrate revoked defendant's CDL and physically seized it.

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his CDL and his prosecution for DWI violates his protection against double jeopardy. Finally, defendant claimed he was denied equal protection because the DMV did not take action against drivers in the same position as defendant prior to January 2010.<sup>2</sup> On 6 September 2011, the Duplin County District Court granted defendant's motion and dismissed defendant's DWI charge after concluding that defendant's due process rights and protection against double jeopardy were violated ("District Court order"). The State appealed the District Court order to Superior Court pursuant to N.C. Gen. Stat. § 15A-1432.

On 9 March 2012, the Duplin County Superior Court issued an order ("Superior Court order") reversing the District Court order, reinstating defendant's charge of DWI, and remanding the matter back to District Court. The Superior Court order also specifically noted that an appeal of this order was "appropriately justiciable in the appellate division as an interlocutory matter." Defendant appealed the Superior Court order on 19 March 2012.

**Arguments**

Defendant first argues that prosecuting him for DWI in addition to revoking his CDL pursuant to N.C. Gen. Stat. § 20-17.4(a)(7) subjects him to multiple punishments for the same offense in violation of the Double Jeopardy clause. Thus, the Superior Court erred by reinstating the DWI charge against him. I do not agree.

"The standard of review for alleged violations of constitutional rights is *de novo*." *State v. Graham*, 200 N.C. App. 204, 214, 683 S.E.2d 437, 444 (2009), *appeal dismissed and disc. review denied*, 363 N.C. 857, 694 S.E.2d 766 (2010); *see also Piedmont Triad Reg'l Water Auth. v. Sumner Hills, Inc.*, 353 N.C. 343, 348, 543 S.E.2d 844, 848 (2001) ("*[D]*e novo review is ordinarily appropriate in cases where constitutional rights are implicated." (citations omitted)).

"The Double Jeopardy Clause prohibits a second prosecution for the same offense after acquittal, a second prosecution for the same offense after conviction, and multiple punishments for the same offense." *State v. Evans*, 145 N.C. App. 324, 326, 550 S.E.2d 853, 856 (2001) (internal quotation marks omitted). "The Law of the Land Clause incorporates similar protections under the North Carolina Constitution." *State v. Oliver*, 343 N.C. 202, 205, 470 S.E.2d 16, 18

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2. It should be noted that although defendant raised an equal protection claim in his motion to dismiss, this issue was not addressed by the District or Superior court. Moreover, it was not raised in defendant's appeal to this Court. Therefore, we will not address this issue on appeal.

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(1996). While it protects an individual “against the imposition of multiple criminal punishments for the same offense,” the Double Jeopardy Clause “does not prohibit the imposition of all additional sanctions that could, ‘in common parlance,’ be described as punishment.” *Hudson*, 522 U.S. at 98-99, 139 L. Ed. 2d at 458.

To determine whether a punishment is criminal or civil for double jeopardy purposes, *Hudson* established a two-part inquiry. 522 U.S. at 99, 139 L. Ed. 2d at 459. First, the court must determine “whether the legislature, in establishing the penalizing mechanism, indicated either expressly or impliedly a preference for one label or another.” *Id.* (internal quotation marks omitted). This first step involves principles of statutory interpretation and construction. *Evans*, 145 N.C. App. at 329-30, 550 S.E.2d at 857-58.

Second, “[e]ven in those cases where the legislature has indicated an intention to establish a civil penalty,” the court must examine “whether the statutory scheme was so punitive either in purpose or effect . . . as to transform what was clearly intended as a civil remedy into a criminal penalty.” *Id.* at 327, 550 S.E.2d at 856 (internal quotation marks and citations omitted). In evaluating the second part of the inquiry, the Supreme Court advanced the seven factors listed in *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168-69, 9 L. Ed. 2d 644, 660-61 (1963), as “useful guideposts[.]” *Evans* at 332, 550 S.E.2d at 859. Those seven factors are:

- (1) whether the sanction involves an affirmative disability or restraint;
- (2) whether it has historically been regarded as a punishment;
- (3) whether it comes into play only on a finding of scienter;
- (4) whether its operation will promote the traditional aims of punishment—retribution and deterrence;
- (5) whether the behavior to which it applies is already a crime;
- (6) whether an alternative purpose to which it may rationally be connected is assignable for it;
- and (7) whether it appears excessive in relation to the alternative purpose assigned.

*Hudson*, 522 U.S. at 99-100, 139 L. Ed. 2d at 459 (internal quotation marks omitted). In applying the factors, “no one factor is controlling[.]” *Evans*, 145 N.C. App. at 328, 550 S.E.2d at 856, and “only the clearest proof will suffice to override legislative intent and transform what has been denominated a civil remedy into a criminal penalty.” *Hudson*, 522 U.S. at 100, 139 L. Ed. 2d at 459 (internal quotation marks omitted).



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With regard to the first step of the *Hudson* inquiry, while N.C. Gen. Stat. § 20-17.4 (2011) is not expressly labeled criminal or civil by the legislature, our Supreme Court “has long viewed drivers’ license revocations as civil, not criminal, in nature[.]” *Oliver*, 343 N.C. at 207-08, 470 S.E.2d at 20, and has focused on the remedial purpose of the revocations.<sup>3</sup> *Henry v. Edmisten*, 315 N.C. 474, 495, 340 S.E.2d 720, 734 (1986). Defendant contends that the purpose of N.C. Gen. Stat. § 20-17.4 is fundamentally different than the revocation statute at issue in *Oliver* because the length of time the driver’s license is revoked is longer. However, I conclude that the one-year revocation in N.C. Gen. Stat. § 20-17.4 still has a rational remedial purpose for two primary reasons. First, CDL penalties are much more severe in general. For example, a violation of N.C. Gen. Stat. § 20-142.1 through 142.5 when the driver is operating a commercial motor vehicle leads to automatic disqualification of that person’s CDL for 60 days for a first violation. N.C. Gen. Stat. § 20-17.4(k). However, for noncommercial drivers, a violation of the same statutes constitutes an infraction and does not automatically result in a revocation. N.C. Gen. Stat. § 20-176(a) (2011). Second, the CDL penalty violations are more severe due to the large threat of danger the types of vehicles driven with a commercial license pose to other drivers. This Court has noted that “[a] Class A commercial driving privilege encompasses some of the largest vehicles on the road.” *State v. Reid*, 148 N.C. App. 548, 553, 559 S.E.2d 561, 564 (2002). The classes of vehicles are based solely on a vehicle’s weight. Pursuant to N.C. Gen. Stat. § 20-4.01(2a) (2011), a Class A motor vehicle includes any vehicle that has either of the following:

a. . . . [A] combined [Gross Vehicle Weight Rating] of at least 26,001 pounds and includes as part of the combination a towed unit that has a [Gross Vehicle Weight Rating] of at least 10,001 pounds.

b. . . . [A] combined [Gross Vehicle Weight Rating] of less than 26,001 pounds and includes as part of the combination a towed unit that has a [Gross Vehicle Weight Rating] of at least 10,001 pounds.

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3. A disqualification of one’s driver’s license is analogous to a revocation or suspension. Disqualification is defined as “[a] withdrawal of the privilege to drive a commercial motor vehicle.” N.C. Gen. Stat. § 20-4.01(5b) (2011). Similarly, a revocation is defined as “[t]ermination of a licensee’s or permittee’s privilege to drive or termination of the registration of a vehicle for a period of time stated in an order of revocation or suspension. The terms ‘revocation’ or ‘suspension’ or a combination of both terms shall be used synonymously.” N.C. Gen. Stat. § 20-4.01(36).

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A Class A motor vehicle includes 18-wheeler tractor trailers. Consequently, “[a] commercial driver’s license is an extraordinary privilege which carries with it additional responsibilities[,]” and “the state has a greater interest in the public’s safety regarding commercial drivers because there exists a greater risk of harm.” *Reid*, 148 N.C. App. at 553, 559 S.E.2d at 564. Thus, I am not persuaded that our Supreme Court’s conclusion that license revocation statutes are civil, as stated in *Oliver*, 343 N.C. at 207-08, 470 S.E.2d at 20, does not apply to the statute at issue here simply because the length of the revocation period is longer.

With regard to the second step of the *Hudson* inquiry, I do not believe defendant has established the “clearest proof” necessary to transform a civil penalty into a criminal one. *Hudson*, 522 U.S. at 100, 139 L. Ed. 2d at 459. In applying the first three *Kennedy* factors, defendant concedes that they do not support a finding of criminal punishment.

Under the fourth factor, the Court must determine whether the sanction promotes the “traditional aims of punishment—retribution and deterrence.” *Id.* at 99, 139 L. Ed. 2d at 459. The “mere presence” of a deterrent effect is not enough to render a sanction criminal. *Id.* at 105, 139 L. Ed. 2d at 463; *see also State v. Beckham*, 148 N.C. App. 282, 286, 558 S.E.2d 255, 258 (2002). While it is clear that a one-year suspension of defendant’s CDL would certainly have a deterrent effect, that effect is substantially outweighed by the overriding remedial purpose of protecting the public from the great harm posed by commercial vehicles. Moreover, the deterrent effect is mitigated by the fact that the statute only disqualifies defendant from driving a commercial vehicle, not his personal vehicle. While the majority focuses on the fact that other courts emphasized the short-term nature of the revocation when determining whether the deterrent effect outweighed any remedial purpose, *see Oliver*, 343 N.C. at 209, 470 S.E.2d at 21, and *Evans*, 145 N.C. App. at 332, 550 S.E.2d at 859, the statutes at issue in those cases dealt with regular driver’s licenses, not commercial vehicle driver’s licenses. Due to the greater danger posed to the public by the nature of the vehicles driven with a Class A CDL, those courts emphasis on the short-term nature of the revocation is not applicable to the situation here. Therefore, even though the revocation period for defendant’s CDL is longer than that of other license revocation statutes, I conclude that the deterrent effect of N.C. Gen. Stat. § 20-17.4(a)(7) is insufficient to implicate double jeopardy.

The fifth *Kennedy* factor examines whether the behavior that constitutes a violation of N.C. Gen. Stat. § 20-17.4(a)(7) could also

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serve as a basis for another crime. *Hudson*, 522 U.S. at 99, 139 L. Ed. 2d at 459. Here, it is uncontroverted that violating N.C. Gen. Stat. § 20-16.5 automatically triggers the civil disqualification of defendant's CDL pursuant to N.C. Gen. Stat. § 20-17.4(a)(7).

"The final two factors under the *Kennedy* analysis require us to decide whether there is a remedial purpose behind [N.C. Gen. Stat. § 20-17.4(a)(7)], and if so, whether the statute is excessive in relation to the remedial purpose." *Evans*, 145 N.C. App. at 334, 550 S.E.2d at 860. As already discussed, I believe that N.C. Gen. Stat. § 20-17.4(a)(7), along with other license revocation statutes, have a remedial purpose—protecting public safety. Moreover, I disagree with the majority's conclusion that the statute is excessive given the nature of the vehicles at issue and the greater risk of harm they present. In applying the final *Kennedy* factors, I acknowledge that this Court has cautioned that:

at some point, a further increase in the revocation period by the General Assembly becomes excessive, even when considered in light of the well-established goals of N.C.G.S. § 20-16.5. Whether it is a further doubling or tripling of the revocation period, there is a point at which the length of time can no longer serve a legitimate remedial purpose, and the revocation provision could indeed violate the Double Jeopardy Clause.

*Evans*, 145 N.C. App. at 332, 550 S.E.2d at 859. However, the statute at issue in *Evans* involved revocation of a regular driver's license, not a CDL, and "the state has a greater interest in the public's safety regarding commercial drivers because there exists a greater risk of harm." *Reid*, 148 N.C. App. at 553, 559 S.E.2d at 564. Therefore, I do not agree with the majority's conclusion that the Court's warning in *Evans* is applicable to the statute at issue here.

Based on my application of the two-part *Hudson* test, I conclude that prosecuting defendant on his DWI charge would not violate double jeopardy. Consequently, I would affirm the trial court's order on this issue.

Next, defendant contends that his one-year CDL disqualification violated his due process rights. The majority concludes that because the one-year revocation terminated 4 July 2011, his due process claim is moot. While I agree with the majority that his claim is moot, I believe the issue is a matter of public interest and constitutes an exception to the mootness doctrine. "Even if moot, however, this

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Court may, if it chooses, consider a question that involves a matter of public interest, is of general importance, and deserves prompt resolution.” *N.C. State Bar v. Randolph*, 325 N.C. 699, 701, 386 S.E.2d 185, 186 (1989); *see also Thomas v. N.C. Dept. of Human Res.*, 124 N.C. App. 698, 705, 478 S.E.2d 816, 820 (1996) (noting that one of the five recognized exceptions to the mootness doctrine is a question that involves a matter of public interest), *aff’d per curiam*, 346 N.C. 268, 485 S.E.2d 295 (1997). Here, the present controversy presents such a matter of public interest given the fact that the statute at issue results in an automatic revocation of an individual’s CDL without a hearing. Therefore, even though defendant’s claim is moot, I would review it under the public interest exception.

However, even though I conclude that defendant’s claim is reviewable, it fails. Defendant’s argument is not properly before this Court. Essentially, defendant is attempting to assert a due process claim with regard to the civil CDL disqualification in an appeal of his criminal DWI charge. Defendant’s argument should be raised in a civil claim against the DMV, not in a criminal appeal. Our Supreme Court has noted that:

It is well established that the same motor vehicle operation may give rise to two separate and distinct proceedings. One is a civil and administrative licensing procedure instituted by the Director of Motor Vehicles to determine whether a person’s privilege to drive is revoked. The other is a criminal action instituted in the appropriate court to determine whether a crime has been committed. Each action proceeds independently of the other and the outcome of one is of no consequence to the other.

*Joyner v. Garrett*, 279 N.C. 226, 238, 182 S.E.2d 553, 562 (1971). Accordingly, defendant’s claim was not properly before the Superior Court nor is it properly before this Court. Thus, I believe the Superior Court erred in considering defendant’s due process claim, and I would reverse the Superior Court order and remand for it to enter an order consistent with this opinion. Although I would decline to address defendant’s due process claim on appeal, I also note my concern, as did the majority, that the failure to provide defendant with any procedural mechanism to challenge the disqualification may constitute a due process violation. However, that argument must be raised in a separate civil proceeding.

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## Conclusion

Based on an application of the two-step *Hudson* inquiry, I conclude that the revocation of defendant's CDL is a civil sanction. Therefore, prosecuting defendant for DWI would not violate his double jeopardy protection, and I would affirm the Superior Court order on this issue. With regard to defendant's due process claim, I would hold that the Superior Court did not have jurisdiction to review this claim. Thus, in addressing it, the Superior Court erred, and I would reverse its order on this issue.

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STATE OF NORTH CAROLINA  
v.  
RONDELL LUVELL SANDERS

No. COA12-676

Filed 15 January 2013

**Sentencing—prior record level—out-of-state crimes—comparison of punishments not sufficient**

The trial court erred when sentencing defendant for armed robbery by finding that defendant's convictions in Tennessee were substantially similar to certain North Carolina offenses and assigning prior record level points accordingly. At no point in its evaluation of defendant's Tennessee convictions did the trial court compare the elements of the allegedly similar North Carolina offenses against the elements of the Tennessee offenses. A review of the punishments associated with a crime is not the same as a comparison of its elements and does not meet the substantial similarity test.

Appeal by Defendant from judgment entered 14 December 2011 by Judge Wayland J. Sermons, Jr., in Beaufort County Superior Court. Heard in the Court of Appeals 25 October 2012.

*Attorney General Roy Cooper, by Assistant Attorney General Lora C. Cubbage, for the State.*

*W. Michael Spivey for Defendant.*

STEPHENS, Judge.

## STATE v. SANDERS

[225 N.C. App. 227 (2013)]

*Procedural History and Evidence*

On 18 November 2009 Defendant Rondell Luvell Sanders (“Sanders”) was tried on charges of robbery with a dangerous weapon. Sanders left the courtroom during jury selection, did not return, and the trial was therefore held in his absence. On 19 November 2009 the jury returned a guilty verdict. Sanders was subsequently apprehended in Michigan and brought back to North Carolina in 2011. On 14 December 2011, Sanders was brought to court for sentencing. In calculating his prior record level, the State sought to have two sentencing points included in the court’s calculus because of two prior misdemeanor convictions in Tennessee for “theft of property” and “domestic assault.” In doing so, the State offered evidence consisting of a computerized printout of Sanders’s criminal history, a prior record level worksheet, copies of judgments against Defendant, online printouts of the relevant Tennessee statutes, and a sheet that categorized the different gradations of Tennessee felonies and misdemeanors. Following a colloquy between the trial judge and counsel for the State and for Sanders, the judge stated on the record that “for each out-of-state conviction listed [on the prior record level worksheet], the Court finds by a preponderance of the evidence that the [Tennessee] offense is substantially similar to a North Carolina offense . . . .” As a result, the trial court assigned one point for each out-of-state offense, giving Sanders a total of five points, the minimum number of points required for a prior record level III. Sanders was sentenced to a minimum of 92 and a maximum of 120 months in prison. Sanders appeals the trial court’s calculation of his prior record level.

*Standard of Review*

“The standard of review relating to the sentence imposed by the trial court is whether the sentence is supported by evidence introduced at the trial and sentencing hearing.” *State v. Fortney*, 201 N.C. App. 662, 669, 687 S.E.2d 518, 524 (2010) (citation omitted). “[T]he question of whether a conviction under an out-of-state statute is substantially similar to an offense under North Carolina statutes is a question of law requiring *de novo* review on appeal.” *Id.* (internal quotation marks and citation omitted).

*Discussion*

On appeal, Sanders argues (1) that the trial court erred by improperly comparing the punishments for Sanders’s Tennessee con-

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victions with the punishments for his North Carolina offenses, instead of comparing the elements of those offenses, and (2) that, in either circumstance, the Tennessee convictions and the North Carolina offenses are not substantially similar and, thus, should not have been considered when determining Sanders's prior record level. For the following reasons, we remand for resentencing.

"The prior record level of a felony offender is determined by calculating the sum of the points assigned to each of the offender's prior convictions . . . ." N.C. Gen. Stat. § 15A-1340.14(a)(2011). The State must prove "by a preponderance of the evidence[] that a prior conviction exists and that the offender before the court is the same person as the offender named in the prior conviction." N.C. Gen. Stat. § 15A-1340.14(f). A prior conviction shall be proved by (1) stipulation of the parties; (2) an original or copy of the court record of the prior conviction; (3) a copy of records maintained by the Division of Criminal Information, the Division of Motor Vehicles, or of the Administrative Office of the Courts; or (4) any other method found by the court to be reliable. *Id.* Substantial similarity is a question of law, and the defendant cannot validly stipulate to the State's characterization of the laws being compared. *State v. Palmateer*, 179 N.C. App. 579, 581-82, 634 S.E.2d 592, 593-94 (2006).

Generally, "a conviction occurring in a jurisdiction other than North Carolina . . . is classified as a Class 3 misdemeanor if the jurisdiction in which the offense occurred classifies the offense as a misdemeanor." N.C. Gen. Stat. § 15A-1340.14(e). No sentencing points are assigned for Class 3 misdemeanor convictions. *See* N.C. Gen. Stat. § 15A-1340.14(b). However,

[i]f the State proves by the preponderance of the evidence that an offense classified as a misdemeanor in the other jurisdiction is *substantially similar* to an offense classified as a Class A1 or Class 1 misdemeanor in North Carolina, the conviction is treated as a Class A1 or Class 1 misdemeanor for assigning prior record level points.

N.C. Gen. Stat. § 15A-1340.14(e) (emphasis added).

In determining "whether the out-of-state conviction is substantially similar to a North Carolina offense," the trial court must compare "the *elements* of the out-of-state offense to those of the North Carolina offense." *Fortney*, 201 N.C. App. at 671, 687 S.E.2d at 525 (emphasis added) (citation omitted). "[T]he requirement set forth in

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N.C. Gen. Stat. § 15A-1340.14(e) is not that the statutory wording precisely match, but rather that the offense be ‘substantially similar.’ ” *State v. Sapp*, 190 N.C. App. 698, 713, 661 S.E.2d 304, 312 (2008), *appeal dismissed and disc. review denied*, 363 N.C. 661, 685 S.E.2d 799 (2009).

We emphasize that “copies of the . . . statutes from another jurisdiction, *and comparison of their provisions to the criminal laws of North Carolina*, are sufficient to prove by a preponderance of the evidence that the crimes of which defendant was convicted in those states were substantially similar to classified crimes in North Carolina for purposes of G.S. § 15A-1340.14(e).”

*State v. Burgess*, \_\_ N.C. App. \_\_, \_\_, 715 S.E.2d 867, 870 (2011) (quoting *State v. Rich*, 130 N.C. App. 113, 117, 502 S.E.2d 49, 52 (1998) (emphasis added)) (internal brackets omitted); *see also State v. Hanton*, 175 N.C. App. 250, 254, 623 S.E.2d 600, 604 (2006) (noting that, when considering out-of-state offenses, the determination of a defendant’s prior record level involves “comparing the elements of a defendant’s prior convictions under the statutes of foreign jurisdictions with the elements of crimes under North Carolina statutes”) (citation, internal quotation marks, and internal brackets omitted).

The trial court in this case stated that Sanders’s prior Tennessee misdemeanor convictions for theft and domestic assault were substantially similar to “a North Carolina offense.” Accordingly, Sanders received two points which, together, moved him from a prior record level II to a prior record level III. In arguing for such a determination, the State provided the trial court with an exhibit (“State’s Exhibit 1”), which included a prior conviction worksheet compiled by the State, evidence of Sanders’s criminal history in North Carolina, two photographs of Sanders, an explanation of Tennessee sentencing gradations, copies of the judgments at issue from the State of Tennessee, and copies of the relevant Tennessee statutes for assault and theft. State’s Exhibit 1 did not include copies of the relevant North Carolina statutes to which the Tennessee convictions were being compared or the elements of those North Carolina crimes. Sanders did not stipulate to the State’s compilation of his prior record and at no point during the hearing did the State offer further evidence of the similarity between Sanders’s prior Tennessee convictions and those North Carolina crimes which it alleged were substantially similar. Indeed, the State did not even identify by name or statute number the North



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Carolina offenses it contended were substantially similar to the Tennessee convictions.

In considering the State's evidence, the trial court alluded to State's Exhibit 1, stating "I'm getting ready to look at [a document] that indicates you were convicted of Theft of Property in 2009 in Tennessee and Domestic Assault in 2009 on a separate date in Tennessee, each of which are Class 1 or A-1 misdemeanors in North Carolina is what the State contends . . . ." The court then proceeded with the following faulty comparison:

So the ones in question are a conviction in 2009 of misdemeanor Theft of Property, and so I'm looking at the—a Class A misdemeanor is what the materials contain in Exhibit [1]. A Class A misdemeanor if the value of the property or services obtained is \$500 or less. A Class A misdemeanor is punished in Tennessee by not greater than 11 months and 29 days in jail, or a fine not to exceed \$2,500, or both, and the State would contend that that's substantially similar to our Class 1 misdemeanor.

. . . .

[T]he next charge is . . . Domestic Assault, for which you've assigned an A-1 which would still be one point, and the defendant was convicted of that in 2009, and the statute shows that Domestic Assault again is a Class A misdemeanor under Tennessee law, and again is punishable by no greater than 11 months 29 days, or a fine not to exceed \$2,500. The State contends that that is similar to our Class 1 misdemeanor level[.]

Based on that assessment, the court found that "for each out-of-state conviction listed in Section 4 [of the worksheet] . . . the offense is substantially similar to a North Carolina offense and that the North Carolina classification assigned to this offense in Section 4 is correct." Based on that finding, the court added two extra points to Sanders's prior record level, totaling five points and equaling a prior record level III.

It bears repeating that "[d]etermination of whether the out-of-state conviction is substantially similar to a North Carolina offense is a question of law involving comparison of the *elements of the out-of-state offense to those of the North Carolina offense.*" *Fortney*, 201 N.C. App. at 671, 687 S.E.2d at At no point in its evaluation of Sanders's

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Tennessee convictions did the trial court compare the elements of the allegedly similar North Carolina offenses against the elements of the Tennessee offenses.<sup>525</sup> (citation omitted) (emphasis added). Indeed, as previously noted, the North Carolina offenses were neither named nor presented in State's Exhibit 1. There is no evidence in the record before this Court that the trial court compared the elements of the Tennessee crimes with the elements of any North Carolina crimes when reviewing State's Exhibit 1 during the sentencing hearing. On the contrary, it appears that the trial court simply accepted at face value the State's *contention* that the Tennessee offenses were substantially similar to Class A1 or 1 misdemeanors in North Carolina. When the trial court orally evaluated Sanders's Tennessee convictions, the transcript indicates that it focused solely on the punishment aspects of those crimes, not their substantive elements. A review of the punishments associated with a crime is not the same as a comparison of its elements and does not meet the substantial similarity test. Therefore, we hold that the trial court erred in finding that Defendant's convictions in Tennessee were substantially similar to certain North Carolina offenses.

Because we have concluded that the trial court erred in its comparison of the Tennessee punishments to certain North Carolina offenses, we need not address Defendant's second argument that the Tennessee convictions were not actually substantially similar to certain North Carolina offenses. Accordingly, we remand this case to the trial court for a proper comparison of the elements of those North Carolina crimes, if any, that the State contends are substantially similar to Sanders's Tennessee convictions.

REMANDED for resentencing consistent with this opinion.

Judges GEER and McCULLOUGH concur.

**STATE v. WILKES**

[225 N.C. App. 233 (2013)]

STATE OF NORTH CAROLINA

v.

TIMOTHY C. WILKES

No. COA12-387

Filed 15 January 2013

**1. Assault—deadly weapon with intent to kill inflicting serious injury—intent to kill—sufficiency of evidence**

The trial court did not err by denying defendant's motions to dismiss the charge of assault with a deadly weapon with intent to kill inflicting serious injury because there was insufficient evidence to show intent to kill. Defendant's conviction was based on his use of a bat to assault his wife; both the nature and manner of the assault presented sufficient evidence for a jury to conclude that defendant had intent to kill.

**2. Assault—appellate review—substantial evidence at trial—jury findings—irrelevant**

In an appeal from an assault prosecution arising from defendant's prolonged assault on his wife, including an assault with a bat, a jury finding that defendant was not guilty of attempted murder and the lack of a finding of intent to kill with respect to an assault with his fists were irrelevant. The inquiry focused only on whether there was substantial evidence of intent to kill presented at trial.

**3. Assault—two charges—not a single transaction**

Although defendant argued that the trial court erred by denying his motions to dismiss one of two felony assault charges since they constituted a single transaction, the State presented substantial evidence that there was a distinct interruption in the assaults in that the assaults involved a separate thought process, a time distinction, and injuries on different parts of the victim's body. The fact that both assaults were aimed at the head did not merge the offenses.

**4. Sentencing—mitigating factor—evidence of employment history**

The sentencing judge erred by failing to find as a mitigating factor that defendant had a positive employment history where uncontradicted and manifestly credible evidence of defendant's positive employment history was introduced.

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[225 N.C. App. 233 (2013)]

Judge HUNTER, Robert C., concurring in part and dissenting in part.

Appeal by defendant from judgment entered 16 June 2011 by Judge V. Bradford Long in Moore County Superior Court. Heard in the Court of Appeals 24 October 2012.

*Attorney General Roy Cooper, by Assistant Attorney General Creecy C. Johnson, for the State.*

*Duncan B. McCormick for defendant-appellant.*

HUNTER, JR., Robert N., Judge.

Timothy C. Wilkes (“Defendant”) appeals from judgment entered against him after a jury found him guilty of assault with a deadly weapon with intent to kill inflicting serious injury, misdemeanor child abuse, and assault with a deadly weapon inflicting serious injury. On appeal, Defendant argues that the trial court erred by: (1) denying Defendant’s motions to dismiss the charge of assault with a deadly weapon with intent to kill inflicting serious injury; (2) denying Defendant’s motions to dismiss one of the two felony assault charges; and (3) imposing a sentence in the aggravated range for Defendant’s assault with a deadly weapon inflicting serious injury conviction. After careful review, we find no error at trial and remand for resentencing.

**I. Factual & Procedural Background**

The State’s evidence at trial tended to establish the following: In September of 1993 or 1994, Defendant married Ms. Julie Bush (“Ms. Bush”). The couple had two sons together, C.W. and E.W., and Ms. Bush also had a son, Andrew, from a previous relationship. At trial, Andrew, C.W., and E.W. were ages twenty-three, fourteen, and twelve, respectively. Ms. Bush and Defendant were married for fifteen years. During that time, the couple separated twice; the first separation occurred after Defendant pushed Ms. Bush against a wall and the second followed an incident where Defendant punched Andrew in the face several times. The second separation lasted from October 2008 through October 2009. In October 2009, Ms. Bush retained an attorney and told Defendant that she wanted a divorce.

The incident in question occurred on the evening of 24 October 2009 after Ms. Bush had returned from a birthday party. Defendant later testified that he was upset that Ms. Bush had attended the party because he “could lose her to a guy over there.” Soon after Ms. Bush

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returned home, E.W. came running upstairs to inform her that Defendant was at the back door. Ms. Bush unlocked the back door to “see what [Defendant] wanted because . . . [she] didn’t expect him to be there.” Defendant pushed past her into the house and refused to leave. Ms. Bush told C.W. to call 9-1-1, but Defendant pulled the telephone out of the wall. He then dropkicked the television and threw the computer monitor. Defendant then grabbed Ms. Bush and started punching her in the face. He blackened both of her eyes, broke her nose, and loosened all of her teeth. Ms. Bush fell to her knees in front of him.

Then, C.W., who was twelve years old at the time, came into the room with a baseball bat telling Defendant, “[d]on’t hit my Mama again.” Defendant continued to move towards Ms. Bush, so C.W. hit Defendant in the stomach with the bat. Defendant turned to go after C.W., but Ms. Bush grabbed Defendant around the waist and held on to him for “a while.” Grabbing the bat from C.W., Defendant then began beating Ms. Bush with it—first on her arms, while she was holding them up, and then on her head “over and over again” after she dropped her arms. Ms. Bush fell to the fetal position, and she looked up only to be struck again with the bat. Ms. Bush lost consciousness. Defendant had crushed two of Ms. Bush’s fingers, broken bones in her forearms and her hands, and cracked her skull.

Soon after Ms. Bush regained consciousness, EMS and the Moore County Sheriff’s Office arrived at the scene. Detective Sergeant Cathy Williams (“Detective Williams”) described C.W. and E.W. as “basically hysterical” over what had happened to their mother. Both boys told Deputy Robert Langford (“Deputy Langford”): “My dad beat my mom.” Along with two firefighters, Deputy Langford discovered Defendant in the backyard and took him into custody. Defendant testified that he could not remember anything after kicking the television and pulling the phone out of the wall. The next thing he recalled was waiting for the police by his truck, stabbing himself on the wrist, and asking the officer to shoot him.

Meanwhile, Ms. Bush was rushed to the hospital for care, which included multiple surgeries inserting metal plates into her left arm and right hand. From conversations with EMS, Detective Williams “was uncertain . . . if [Ms. Bush] was going to make it through the night.”

It took several months for the open wound on Ms. Bush’s head to heal and for Ms. Bush to fully recover her hearing, vision, and writing ability. At the time of the trial, Ms. Bush continued to suffer from non-

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positional proximal vertigo, and to this day, she has no sense of smell due to severed nerves.

Prior to and at trial in June 2011, Defendant moved to dismiss one of the two indictments for assault contending that they constituted one continuous transaction. The trial court denied the motions. Both at the close of the State's evidence and before the case was sent to the jury, Defendant moved to dismiss the charge of assault with a deadly weapon with intent to kill inflicting serious injury for insufficient evidence, but the trial court denied both motions.

On 16 June 2011, the jury found Defendant not guilty of felony breaking and entering and attempted murder. However, it found Defendant guilty of assault with a deadly weapon with intent to kill inflicting serious injury, a Class C felony, *see* N.C. Gen. Stat. § 14-32(a) (2011); misdemeanor child abuse; and assault with a deadly weapon inflicting serious injury, a Class E felony, *see* N.C. Gen. Stat. § 14-32(b). Consolidating the convictions of misdemeanor child abuse and assault with a deadly weapon with intent to kill inflicting serious injury (09 CRS 54366), the trial court sentenced Defendant in the presumptive range to a term of 73 to 97 months. Regarding Defendant's conviction of assault with a deadly weapon inflicting serious injury (10 CRS 1555), Defendant admitted to three aggravating factors, and the trial court sentenced him in the aggravated range to a term of 31 to 47 months. Although defendant asked the trial court to consider mitigating factors, the trial court declined to find mitigating factors. Defendant's sentences were to run consecutively.

On 27 June 2011, Defendant filed written notice of appeal.

**II. Jurisdiction**

This Court has jurisdiction to hear the instant case pursuant to N.C. Gen. Stat. § 7A-27(b) (2011).

**III. Analysis**

[1] Defendant first argues that the trial court erred by denying his motions to dismiss the charge of assault with a deadly weapon with intent to kill inflicting serious injury because there was insufficient evidence to show intent to kill. We disagree.

On a motion to dismiss, a trial court must consider: (1) "whether there is substantial evidence of each element of the offense charged;" and (2) whether there is substantial evidence "that the defendant is the perpetrator." *State v. Bonney*, 329 N.C. 61, 76-77, 405 S.E.2d 145,

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154 (1991). “Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.” *State v. Franklin*, 327 N.C. 162, 171, 393 S.E.2d 781, 787 (1990). The evidence must be viewed in the light most favorable to the State, meaning that any inconsistencies are resolved in the State’s favor and the State is entitled to “the benefit of every reasonable inference to be drawn in its favor from the evidence.” *State v. Blake*, 319 N.C. 599, 604, 356 S.E.2d 352, 355 (1987).

Defendant’s conviction for assault with a deadly weapon with intent to kill inflicting serious injury was based on his use of the bat to assault Ms. Bush.<sup>1</sup> “The elements of assault with a deadly weapon with intent to kill inflicting serious injury are: (1) an assault, (2) with the use of a deadly weapon, (3) with an intent to kill, and (4) inflicting serious injury, not resulting in death.” *State v. Tirado*, 358 N.C. 551, 579, 599 S.E.2d 515, 534 (2004).

“An intent to kill is a matter for the State to prove . . . and is ordinarily shown by proof of facts from which an intent to kill may be reasonably inferred.” *State v. Thacker*, 281 N.C. 447, 455, 189 S.E.2d 145, 150 (1972). Such intent may be inferred from “the nature of the assault, the manner in which it was made, the conduct of the parties, and other relevant circumstances.” *State v. Barlowe*, 337 N.C. 371, 379, 446 S.E.2d 352, 357 (1994) (citations and quotation marks omitted). Although an assault with a deadly weapon that results in serious injury does not establish a presumption of an intent to kill as a matter of law, *Thacker*, 281 N.C. at 455, 189 S.E.2d at 150, “an assailant must be held to intend the natural consequences of his deliberate act.” *State v. Grigsby*, 351 N.C. 454, 457, 526 S.E.2d 460, 462 (2000) (quotation marks and citation omitted).

In the present case, the nature and manner of the attack on Ms. Bush would support a reasonable inference that Defendant intended to kill Ms. Bush. Defendant hit Ms. Bush even after she fell to her knees. Defendant struck Ms. Bush repeatedly over the head with the baseball bat until she lost consciousness. Taking the evidence in the light most favorable to the State, there is no indication that Ms. Bush ever fought back. In contrast, the evidence establishes that Defendant viciously attacked Ms. Bush after she was on the ground and in the fetal position. Ms. Bush’s wounds to her head, caused by

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1. We note that while the jury had the option to convict Defendant of assault with a deadly weapon with intent to kill inflicting serious injury based on his assault of Ms. Bush with his fists, the jury convicted him of the lesser-included offense of assault with a deadly weapon inflicting serious injury (10 CRS 1555).

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the baseball bat, could have been fatal. Thus, both the nature and manner of Defendant's assault with the bat upon Ms. Bush presented sufficient evidence for a jury to conclude that Defendant had intent to kill.

Furthermore, the circumstances surrounding the attack, including the conduct of the parties, provide additional evidence of intent to kill. Defendant and Ms. Bush had a volatile relationship that included two separation periods stemming from Defendant's aggressive behavior. Ms. Bush had also recently filed for divorce, and Defendant acknowledged that on the evening of the assault he was upset that she was attending a party because he "could lose her to a guy." Thus, Defendant's proffered motivation for his actions support an inference that he intended to kill her to prevent her from becoming involved with another man.

**[2]** Based on the nature, manner, and circumstances of the assault, we conclude that the trial court did not err in denying Defendant's motions to dismiss the assault with a deadly weapon with intent to kill inflicting serious injury charge. While Defendant correctly notes that the jury found Defendant not guilty of attempted murder and did not find intent to kill with respect to the assault committed with Defendant's fists, this is irrelevant to the present inquiry because our review only focuses on whether there was substantial evidence of intent to kill presented at trial. Here, we find there was substantial evidence, and therefore, Defendant's argument is overruled.

**[3]** Next, Defendant argues that the trial court erred by denying his motions to dismiss one of the two felony assault charges as he contends they constituted a single transaction. We disagree.

Prior to trial, Defendant moved to dismiss one of the two felony assault charges on the grounds that permitting both charges would be a violation of double jeopardy since the assault constituted a single transaction. However, the trial court denied this motion.

"Double jeopardy is prohibited both by the Fifth Amendment to the United States Constitution and [North Carolina's] common law." *State v. McCoy*, 174 N.C. App. 105, 115, 620 S.E.2d 863, 871 (2005). "The double jeopardy clause prohibits . . . multiple convictions for the same offense." *State v. Ezell*, 159 N.C. App. 103, 106, 582 S.E.2d 679, 682 (2003). Thus, "[i]n order for a criminal defendant to be charged and convicted of two separate counts of assault stemming from one transaction, the evidence must establish a distinct interruption in the original assault followed by a second assault[,] so that the subsequent



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assault may be deemed separate and distinct from the first.” *State v. Littlejohn*, 158 N.C. App. 628, 635, 582 S.E.2d 301, 307 (2003) (quotation marks and citation omitted) (second alteration in original). In *Littlejohn*, this Court found no error where the defendant was convicted of two assaults that were distinct in time, resulted in injuries to separate parts of the victim’s body, and where the second assault occurred only after the first assault had “ceased.” *Id.* at 636-37, 582 S.E.2d at 307.

Similarly, in *State v. Rambert*, 341 N.C. 173, 175, 459 S.E.2d 510, 512 (1995), the defendant was charged with and convicted of three counts of discharging a firearm into occupied property. At trial, the State’s evidence tended to establish that the victim was sitting in his car, parked in a grocery store parking lot. *Id.* at 176, 459 S.E.2d at 512. The defendant pulled up in another car beside the victim. *Id.* After they exchanged some words, the defendant produced a gun. *Id.* The victim ducked down in his car, and the defendant fired his gun at the victim’s car. *Id.* The bullet entered through the front windshield. *Id.* The victim drove forward, and another bullet hit the passenger side door. *Id.* When the parties were approximately ten yards apart, the defendant pursued the victim and fired a final shot. *Id.* The bullet lodged in the car’s bumper. *Id.* at 176, 459 S.E.2d at 512-13. The defendant challenged the convictions, arguing that they violated double jeopardy. *Id.* at 175, 459 S.E.2d at 511. However, our Supreme Court disagreed, noting the following factors in support of its decision: (1) “[e]ach shot, fired from a pistol, as opposed to a machine gun or other automatic weapon, required that [the] defendant employ his thought processes each time he fired the weapon;” (2) “[e]ach act was distinct in time;” and (3) “each bullet hit the vehicle in a different place.” *Id.* at 176-77, 459 S.E.2d at 513.

In applying the *Rambert* factors to the present case, the State presented substantial evidence that there was a distinct interruption in the assaults.

First, the assaults were the result of separate thought processes. In *Rambert*, our Supreme Court found separate thought processes for three gunshots because the shots were from a pistol, not an automatic weapon, and thus the “defendant employ[ed] his thought processes each time he fired the weapon.” *Id.* at 177, 459 S.E.2d at 513. If the brief amount of thought required to pull a trigger again constitutes a separate thought process, then surely the amount of thought put into grabbing a bat from a twelve-year-old boy and then

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turning to use that bat in beating a woman constitutes a separate thought process.

Second, the acts were distinct in time. The second assault occurred after Defendant had turned his attention away from Ms. Bush to C.W. Ms. Bush had fallen to her knees after the initial attack. When Defendant moved towards C.W., Ms. Bush grabbed Defendant around the waist, holding him for “a while.” The jury was specifically instructed that “to find the defendant guilty of two separate assaults[,] you must find first that there was a distinct interruption in the original assault followed by a second assault.” There was sufficient evidence from the above facts for a jury to determine that the two assaults were distinct in time.

Finally, Ms. Bush sustained injuries on different parts of her body. The dissent concludes that the blows were all aimed at the victim’s head and were thus not in different places. However, the reason Ms. Bush sustained injuries on different parts of her body was because there was a break in the action during which time Defendant grabbed a bat and Ms. Bush put her arms up in order to protect her face. Because the two assaults were distinct in time and involved separate thought processes, the fact that both assaults were aimed at the head does not merge the offenses. Because there were multiple transactions, we find no error.

**[4]** Defendant lastly argues that the trial court erred in sentencing Defendant in the aggravated range for assault with a deadly weapon inflicting serious injury without considering mitigating factors. We agree.

Defendant requested several mitigating factors, including positive employment history, good character/reputation in the community, provocation, and mental condition. “[W]e will find the sentencing judge in error only when evidence of a statutory mitigating factor is both uncontradicted and manifestly credible.” *State v. Butler*, 341 N.C. 686, 693-94, 462 S.E.2d 485, 489 (1995).

The evidence on provocation and on Defendant’s mental condition was unclear and thus the trial court was not required to find either of those factors. Similarly, the State put on evidence that contradicted Defendant’s evidence on good character/reputation in the community, so there was no requirement that the trial court find that factor.

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There was, however, uncontradicted and manifestly credible evidence introduced of Defendant's positive employment history. Defendant introduced his military records, which included commendations and awards. This evidence was uncontradicted, and the credibility of the records was likewise not questioned. We therefore must find that the sentencing judge was in error in failing to find as a mitigating factor that Defendant had a positive employment history, and we therefore remand for resentencing.

**IV. Conclusion**

Because we find there was substantial evidence that Defendant intended to kill Ms. Bush, we hold that the trial court did not err in denying his motion to dismiss for insufficient evidence the assault with a deadly weapon with intent to kill inflicting serious injury charge. We also hold that the trial court did not err in failing to dismiss one of the assault charges, as there were multiple transactions. Finally, we remand for resentencing as the trial court erred by failing to find as a mitigating factor that Defendant had a positive employment history.

NO ERROR AT TRIAL; REMANDED FOR RESENTENCING.

Judge CALABRIA concurs.

Judge HUNTER, Robert C., concurs in part and dissents in part in a separate opinion.

HUNTER, Robert C., Judge, concurring in part and dissenting in part.

While I agree with the majority that the trial court did not err in denying defendant's motions to dismiss the charge of assault with a deadly weapon with intent to kill inflicting serious injury because there was sufficient evidence to establish intent to kill, I conclude that defendant's actions constituted a single assault. Therefore, I must respectfully dissent in regard to defendant's double jeopardy claim, and I would vacate defendant's conviction for assault with a deadly weapon inflicting serious injury, the lesser felony, case number 10 CRS 1555. Accordingly, I would not address the merits of defendant's argument that the trial court erred in sentencing defendant in the aggravated range for this conviction.

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**Background**

A brief recitation of the evidence presented at trial is as follows: In September of 1993 or 1994, defendant married Ms. Julie Bush (“Ms. Bush”). During their marriage, they separated twice. The incident in question occurred on the evening of 24 October 2009 after Ms. Bush had returned home from a party. Soon after Ms. Bush returned home, their youngest son, E.W., ran upstairs and told her that defendant was at the back door. After she unlocked the back door, defendant pushed past her into the house and refused to leave. Ms. Bush told their oldest son, C.W., to call 9-1-1, but defendant pulled the telephone out of the wall. He kicked the television and threw the computer monitor. Defendant began punching Ms. Bush in the face, and she fell to her knees in front of him.

Then, C.W. came into the room with a baseball bat telling defendant, “[d]on’t hit my Mama again.” C.W. hit defendant in the stomach with the bat after defendant kept moving toward Ms. Bush. Defendant turned to go after C.W., but Ms. Bush grabbed defendant around the waist. Grabbing the bat from C.W., defendant then began beating Ms. Bush with it—first on her arms, while she was holding them up, and then on her head “over and over again” after she dropped her arms. Ms. Bush fell to the floor in the fetal position and, eventually, lost consciousness.

Soon after Ms. Bush regained consciousness, EMS and the police from the Moore County Sheriff’s Office arrived at the scene. Ms. Bush was rushed to the hospital.

On 16 June 2011, the jury found defendant guilty of assault with a deadly weapon with intent to kill inflicting serious injury, a Class C felony, *see* N.C. Gen. Stat. § 14-32(a) (2011); misdemeanor child abuse; and assault with a deadly weapon inflicting serious injury, a Class E felony, *see* N.C. Gen. Stat. § 14-32(b). Consolidating the convictions of misdemeanor child abuse and assault with a deadly weapon with intent to kill inflicting serious injury (09 CRS 54366), the trial court sentenced defendant in the presumptive range to a term of 73 to 97 months imprisonment. Regarding defendant’s conviction of assault with a deadly weapon inflicting serious injury (10 CRS 1555), defendant admitted to three aggravating factors, and the trial court sentenced him in the aggravated range to a term of 31 to 47 months imprisonment. Defendant’s sentences were to run consecutively.

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## Arguments

Defendant first argues that the trial court erred by denying his motions to dismiss the charge of assault with a deadly weapon with intent to kill inflicting serious injury because there was insufficient evidence to show intent to kill. I concur with the majority that based on the nature, manner, and circumstances of the assault, the trial court did not err in denying defendant's motion to dismiss this charge.

Next, defendant argues that the trial court erred by denying his motions to dismiss one of the two felony assault charges as he contends they constituted a single transaction. I agree.

Prior to trial, defendant moved to dismiss one of the two felony assault charges on the grounds that permitting both charges would be a violation of double jeopardy since the assault constituted a single transaction. However, the trial court denied this motion.

"Double jeopardy is prohibited by both the Fifth Amendment to the United States Constitution and [North Carolina's] common law." *State v. McCoy*, 174 N.C. App. 105, 115, 620 S.E.2d 863, 871 (2005), *disc. review denied*, 628 S.E.2d 8 (2006). "The double jeopardy clause prohibits . . . multiple convictions for the same offense." *State v. Ezell*, 159 N.C. App. 103, 106, 582 S.E.2d 679, 682 (2003). Thus, "[i]n order for a criminal defendant to be charged and convicted of two separate counts of assault stemming from one transaction, the evidence must establish a distinct interruption in the original assault followed by a second assault[,] so that the subsequent assault may be deemed separate and distinct from the first." *State v. Littlejohn*, 158 N.C. App. 628, 635, 582 S.E.2d 301, 307 (2003) (internal quotation marks omitted). In *Littlejohn*, this Court found no error where the defendant was convicted of two assaults that were distinct in time, the injuries occurred in separate parts of the victim's body, and where the second assault occurred only after the first assault had "ceased." *Id.* at 636-37, 582 S.E.2d at 307.

Similarly, in *State v. Rambert*, 341 N.C. 173, 175, 459 S.E.2d 510, 512 (1995), the defendant was charged with and convicted of three counts of discharging a firearm into occupied property. At trial, the State's evidence tended to establish that the victim was sitting in his car, parked in a grocery store parking lot. *Id.* at 176, 459 S.E.2d at 512. The defendant pulled up in another car beside the victim. *Id.* After they exchanged some words, the defendant produced a gun. *Id.* The victim ducked down in his car, and the defendant fired his gun at the

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victim's car. *Id.* The bullet entered through the front windshield. *Id.* The victim drove forward, and another bullet hit the passenger side door. *Id.* When the parties were approximately ten yards apart, the defendant pursued the victim and fired a final shot. *Id.* The bullet lodged in the car's bumper. *Id.* at 176, 459 S.E.2d at 513. The defendant challenged the convictions, arguing that they violated double jeopardy. *Id.* However, our Supreme Court disagreed, noting the following factors in support of its decision: (1) "[e]ach shot, fired from a pistol, as opposed to a machine gun or other automatic weapon, required that [the] defendant employ his thought processes each time he fired the weapon"; (2) "[e]ach act was distinct in time"; and (3) "each bullet hit the vehicle in a different place." *Id.* at 176-77, 459 S.E.2d at 513.

In *State v. Spellman*, 167 N.C. App. 374, 383, 605 S.E.2d 696, 703 (2004), this Court applied the rationale of *Rambert* to determine whether the defendant's convictions for assault with a deadly weapon on a government official and assault with a deadly weapon violated his constitutional protection from double jeopardy. In concluding that there was no violation of double jeopardy, this Court held that "as in *Rambert*, the evidence in the instant case tends to show that defendant employed his thought process prior to committing the second assault, which occurred at a distinct and separate time after the first assault was completed." *Id.* at 383, 605 S.E.2d at 702.

In applying the *Rambert* factors to the present case, I conclude that the State did not present substantial evidence that there was a distinct interruption in the assaults. First, there was no evidence that defendant's actions were the result of separate thought processes. Although defendant did change weapons during the assault, that change was not due to a separate thought process. Defendant only came into possession of the bat when C.W. hit him with it. I find the facts of this case distinguishable from a situation where a defendant ceases an initial assault, obtains a different weapon, and then renews his assault on a victim. For example, in *Spellman*, 167 N.C. App. at 378, 605 S.E.2d at 700, the defendant and a police officer got into an altercation. As the defendant was trying to drive away, the officer held onto the door of the defendant's truck. *Id.* After the officer was able to pull the defendant from the car, the truck ran over the officer's leg. *Id.* The defendant then got up, ran eighty feet, got back into the truck, and drove the truck toward the officer who was still lying on the ground. *Id.* at 383, 605 S.E.2d at 702. In holding that the facts supported defendant's convictions for two separate assaults, this Court

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concluded that “the evidence in the instant case tends to show that [the] defendant employed his thought process prior to committing the second assault.” *Id.*

In contrast to *Spellman*, there was no evidence that defendant began his attack on Ms. Bush with the baseball bat based on a separate thought process. Instead, the evidence establishes that his actions were a continuation of his prior plan—his acquisition of the baseball bat was the result of happenstance, not purposeful intent. Moreover, the use of multiple weapons does not necessarily require a conclusion that the use of each weapon constitutes a separate assault. *See McCoy*, 174 N.C. App. at 116, 620 S.E.2d at 872 (holding that even though the defendant stabbed, beat, and threw the victim against the wall on one day and struck the victim with his hands and broke the victim’s arm by twisting it the next day, the evidence only supported a conviction of one assault per day).

In applying the second *Rambert* factor, I believe that the evidence does not establish that defendant’s acts were distinct in time. Although defendant turned away briefly to grab the bat from C.W., this momentary distraction is not enough to establish a distinct interruption necessary to sustain two assault charges. While the nature of the assault did escalate, there was no apparent break in the action to support a distinct cessation of defendant’s initial attack so as to consider his use of the bat a separate assault.

Finally, in applying the third *Rambert* factor, while Ms. Bush sustained injuries on different parts of her body when defendant was hitting her with the bat, her testimony establishes that the reason her arms were injured with the bat was because she was holding them up, presumably in an effort to protect her face. However, after she dropped them, defendant continued hitting her in the face with the bat. Thus, defendant was aiming for her head the entire time.

Based on an application of the *Rambert* factors, while the evidence establishes that defendant’s actions constituted a single continuous transaction that resulted in multiple injuries to Ms. Bush, I conclude that it does not establish two separate and distinct assaults. Accordingly, I would vacate defendant’s conviction for assault with a deadly weapon inflicting serious injury, the lesser felony, case number 10 CRS 1555. I note that while defendant’s use of his fists during the initial part of the attack did not establish an intent to kill, his continuation of the assault with the bat did. However, even if an assault escalates such that a defendant’s later actions may support an infer-

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ence of an intent to kill, a defendant should not be automatically precluded from asserting a double jeopardy claim simply because the escalation would allow the State to charge a defendant with a higher offense.

Finally, defendant argues that the trial court erred in imposing a sentence in the aggravated range for assault with a deadly weapon inflicting serious injury without considering mitigating factors. However, since I would vacate defendant's conviction of assault with a deadly weapon inflicting serious injury, I would not reach the merits of defendant's argument.

**Conclusion**

Because I concluded that the evidence supported only one assault charge, I would vacate defendant's conviction for assault with a deadly weapon inflicting serious injury, case number 10 CRS 1555.

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STATE OF NORTH CAROLINA  
v.  
KELVIN DEON WILSON

No. COA12-641

Filed 15 January 2013

**1. Appeal and Error—notice of appeal—timeliness—between rendition and 14 days from entry**

The State's appeal from the granting of a motion to dismiss misdemeanor driving while impaired was timely where the notice of appeal came between rendition of the judgment and the expiration of 14 days from entry of judgment.

**2. Constitutional Law—compelled blood draw—no finding that statute unconstitutional—statutory criteria for dismissal not applicable—non-use of evidence stipulated**

A trial court order dismissing defendant's driving while impaired (DWI) charge for a compelled blood draw was reversed and remanded because none of the statutory criteria for dismissal applied. The trial court did not find that the misdemeanor DWI statute was unconstitutional as applied to defendant and the alleged constitutional violation did not irreparably prejudice the



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preparation of defendant's case. Given the State's stipulation that the blood evidence would not be offered against defendant, the trial court was required to summarily grant defendant's motion to suppress the blood evidence.

Appeal by the State from order entered 18 January 2012 by Judge Joseph E. Turner in Forsyth County Superior Court. Heard in the Court of Appeals 15 November 2012.

*Attorney General Roy Cooper, by Assistant Attorney General Derrick C. Mertz, for the State.*

*Appellate Defender Staples Hughes, by Assistant Appellate Defender Kathleen M. Joyce, for defendant appellee.*

McCULLOUGH, Judge.

The State appeals from an order of the trial court dismissing defendant's charge of misdemeanor driving while impaired under N.C. Gen. Stat. § 15A-954(a)(1) (2011) for constitutional violations involved in the taking of defendant's blood for chemical analysis. Because the trial court erred in interpreting the dismissal statute at issue, and because the State has stipulated that the blood evidence would not be introduced at trial against defendant, we reverse the trial court's order dismissing the charge and remand the case to the trial court for further proceedings consistent with this opinion.

### I. Background

On 13 July 2010, defendant was charged with misdemeanor driving while impaired ("DWI") and driving while license revoked ("DWLR"). Prior to being charged, defendant was arrested by Corporal R. A. Necessary ("Corporal Necessary") of the Winston-Salem Police Department, and Corporal Necessary detained defendant at the local hospital and compelled defendant's blood be drawn for chemical analysis.

On 21 January 2011, pursuant to N.C. Gen. Stat. § 20-38.6 (2011), defendant gave notice to the State of his intention to move the district court to dismiss the DWI charge pursuant to N.C. Gen. Stat. § 15A-954(a)(4). In the alternative, defendant asked the district court to suppress as evidence the results of chemical analysis testing performed on defendant's blood based on constitutional violations involved in Corporal Necessary's compelled blood draw. On 12 August 2011, pursuant to N.C. Gen. Stat. § 20-38.6, the district court

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preliminarily indicated its intention to suppress the blood evidence. The State then sought to appeal the district court's indication to suppress the blood evidence to superior court, but the State abandoned its appeal. Accordingly, the blood evidence was suppressed in district court. Defendant was found guilty of the misdemeanor DWI charge, and defendant pled guilty to the DWLR charge in district court.

On 30 September 2011, defendant appealed the DWI conviction to superior court for a trial de novo. Defendant again filed both a motion to dismiss the charge pursuant to N.C. Gen. Stat. § 15A-954(a)(4) and a motion to suppress the blood evidence for constitutional violations. On 3 January 2012, the superior court held a hearing on defendant's motions. At the hearing, the State informed the superior court that it had abandoned its appeal of the district court's order suppressing the blood evidence and contended to both the court and defense counsel that it would not seek to introduce the blood evidence at trial because of its decision not to pursue the appeal from the district court's suppression order. Accordingly, the State argued that defendant's motion to dismiss the charge should be denied and that the evidence should remain suppressed.

Following the hearing, on 5 January 2012, the superior court orally announced its decision to allow defendant's motion to dismiss on constitutional grounds. Thereafter, on 10 January 2012, the State entered written notice of appeal from the trial court's dismissal order announced in open court on 5 January 2012. Subsequently, on 18 January 2012, the trial court entered its written order detailing findings of fact and conclusions of law and dismissing the DWI charge against defendant for constitutional violations. On 26 March 2012, the State again entered written notice of appeal from the trial court's written order entered 18 January 2012.

**II. Motion to Dismiss for Defective Notice of Appeal**

[1] Defendant has filed with this Court a motion to dismiss the State's appeal, arguing the State's notice of appeal was untimely, thereby depriving this Court of jurisdiction to hear the appeal. In the present case, the trial court orally announced its order granting defendant's motion to dismiss the DWI charge in open court on 5 January 2012. On 10 January 2012, the State filed written notice of appeal from the trial court's oral order granting defendant's motion to dismiss. Thereafter, on 18 January 2012, the trial court entered a written order granting defendant's motion to dismiss the DWI charge. The State then entered a second written notice of appeal from the trial

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court's order on 26 March 2012. Defendant argues that because the State's first written notice of appeal was entered prior to the trial court's issuance of its written order, the notice of appeal was defective. Defendant further contends that the State's second written notice of appeal was entered more than fourteen days after the trial court's entry of its written order of dismissal. Accordingly, defendant argues that the State failed to give timely notice of appeal pursuant to Rule 4 of our Rules of Appellate Procedure.

In support of his argument for dismissal of the State's appeal, defendant relies on this Court's opinion in *State v. Oates*, \_\_\_ N.C. App. \_\_\_, 715 S.E.2d 616 (2011), in which this Court concluded that a notice of appeal entered by the State seven days after the trial court orally granted the defendant's pretrial motion to suppress in open court but prior to the trial court's entry of a corresponding written order of suppression was untimely. However, on 5 October 2012, our Supreme Court vacated this Court's decision in *Oates*, holding:

[U]nder Rule 4 of the North Carolina Rules of Appellate Procedure and N.C.G.S. § 15A-1448, the window for the filing of a written notice of appeal in a criminal case opens on the date of *rendition* of the judgment or order and closes fourteen days after *entry* of the judgment or order.

*State v. Oates*, \_\_\_ N.C. \_\_\_, \_\_\_, 732 S.E.2d 571, 572 (2012). In the present case, the State's first written notice of appeal was entered during this window. Accordingly, the State's notice of appeal was timely, and defendant's motion to dismiss must be denied.

### III. Dismissal of Charge

[2] In the present case, the trial court concluded Corporal Necessary's actions in compelling defendant's blood be drawn were unreasonable under the Fourth and Fourteenth Amendments to the United States Constitution and Article I, Sections 18 and 19 of the North Carolina Constitution. The trial court further reasoned that N.C. Gen. Stat. § 20-139.1(d1) (2011), which provided the officer the authority to compel defendant's blood be drawn, was unconstitutional as applied to defendant under the facts and circumstances of this case. Accordingly, the trial court granted defendant's motion to dismiss under N.C. Gen. Stat. § 15A-954(a)(1). The State contends on appeal that the trial court erred in dismissing the DWI charge against defendant as a remedy for the alleged constitutional violations. We agree.

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Our Supreme Court has recently instructed that “[a] trial court may grant a defendant’s motion to dismiss under N.C.G.S §§ 15A–954 or 15A–1227, or the State may enter ‘an oral dismissal in open court’ pursuant to N.C.G.S. § 15A–931.” *State v. Joe*, \_\_\_ N.C. \_\_\_, \_\_\_, 723 S.E.2d 339, 339-40 (2012). The only one of these three statutes applicable to the circumstances of the present case is N.C. Gen. Stat. § 15A-954, which provides in pertinent part:

(a) The court on motion of the defendant must dismiss the charges stated in a criminal pleading if it determines that:

- (1) The statute alleged to have been violated is unconstitutional on its face or as applied to the defendant.

....

- (4) The defendant’s constitutional rights have been flagrantly violated and there is such irreparable prejudice to the defendant’s preparation of his case that there is no remedy but to dismiss the prosecution.

*Id.* § 15A-954(a)(1), (4).

Section one of this statute, under which the trial court granted defendant’s motion to dismiss in the present case, plainly concerns the statute under which a defendant is charged. Here, defendant was charged with misdemeanor DWI in violation of N.C. Gen. Stat. § 20-138.1. Accordingly, for the trial court to properly dismiss the charge pursuant to section one, the trial court must find and conclude that the misdemeanor DWI statute is unconstitutional as applied to defendant. However, the trial court made no such conclusion in the present case. Rather, the trial court’s conclusion centers on N.C. Gen. Stat. § 20-139.1(d1), which the trial court concluded was violated by Corporal Necessary when the officer compelled defendant’s blood be drawn in violation of constitutional provisions. The trial court’s conclusion, therefore, does not support dismissal under section one of this statute. To the contrary, the trial court’s conclusions that the officer’s actions violated constitutional provisions expressly address the admissibility of the evidence seized as a result of the alleged unconstitutional State action.

In his motion to dismiss, defendant argued the officer’s conduct flagrantly violated his constitutional rights “and there is such

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irreparable prejudice to the defendant's preparation of his case that there is no remedy but to dismiss the prosecution." While defendant's motion addresses the alleged flagrant violation of his constitutional rights, his motion in no way details how there was irreparable damage to the preparation of his case as a result. Indeed, the trial court made no such finding or conclusion, and defendant has made no such argument on appeal. Thus, we fail to see how the alleged constitutional violation at issue here irreparably prejudiced the preparation of defendant's case, and section four of the dismissal statute likewise does not apply to the present case.

Accordingly, there are no statutory grounds for dismissing defendant's DWI charge, and the trial court erred in granting defendant's motion to dismiss. Rather, the appropriate argument by defendant was for suppression of the evidence, and the only appropriate action by the trial court under the circumstances of the present case was to consider suppression of the evidence as the proper remedy if a constitutional violation was found. *See State v. Golden*, 96 N.C. App. 249, 252, 385 S.E.2d 346, 348 (1989) (where defense counsel moved to dismiss criminal charges at trial because evidence against defendant was unconstitutionally obtained, defendant was actually challenging the admissibility of evidence on constitutional grounds, and "[t]herefore, pursuant to G.S. sec. 15A-979(d), defendant's exclusive method for doing this was a motion to suppress evidence").

Pursuant to N.C. Gen. Stat. § 15A-979(d) (2011), "[a] motion to suppress evidence made pursuant to this Article is the exclusive method of challenging the admissibility of evidence upon the grounds specified in G.S. 15A-974." *Id.* N.C. Gen. Stat. § 15A-974(a)(1) (2011) specifically requires suppression of evidence if "[i]ts exclusion is required by the Constitution of the United States or the Constitution of the State of North Carolina[.]" *Id.* "At a hearing to resolve a defendant's motion to suppress, the State carries the burden to prove by a preponderance of the evidence that the challenged evidence is admissible." *State v. Parker*, 183 N.C. App. 1, 3, 644 S.E.2d 235, 238 (2007). Moreover, the trial court must summarily grant a motion to suppress evidence if "[t]he State stipulates that the evidence sought to be suppressed will not be offered in evidence in any criminal action or proceeding against the defendant." N.C. Gen. Stat. § 15A-977(b)(2) (2011). Here, the State abandoned its appeal of the district court's suppression of the blood evidence and has maintained to both the superior court below and this Court that it would not introduce the blood evidence at trial in superior court. Given the State's stipulation

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that the blood evidence would not be offered in evidence against defendant, the trial court was required to summarily grant defendant's motion to suppress the blood evidence.

We note that the arguments presented in both the State's and defendant's appellate briefs are primarily devoted to the constitutional issue of whether the officer's actions in compelling defendant's blood be drawn were unreasonable under the Fourth, Fifth, and Fourteenth Amendments to the United States Constitution and Article I, Sections 18 and 19 of the North Carolina Constitution. However, we need not address this issue. "[A]ppellate courts must 'avoid constitutional questions, even if properly presented, where a case may be resolved on other grounds.'" *James v. Bartlett*, 359 N.C. 260, 266, 607 S.E.2d 638, 642 (2005) (quoting *Anderson v. Assimios*, 356 N.C. 415, 416, 572 S.E.2d 101, 102 (2002)). Here, the trial court erred in dismissing the charge against defendant under N.C. Gen. Stat. § 15A-954(a)(1). Having concluded that none of the statutory criteria for dismissal apply to the present case, we must reverse the order of the trial court dismissing defendant's DWI charge. Further, given the State's stipulation that it would not introduce the challenged evidence at trial against defendant, the trial court was required to summarily grant defendant's motion to suppress. Accordingly, we remand to the trial court for further proceedings consistent with this opinion.

Reversed and remanded.

Judges GEER and STEPHENS concur.

**WAKEMED v. N.C. DEP'T OF HEALTH & HUMAN SERVS.**

[225 N.C. App. 253 (2013)]

WAKEMED, PETITIONER

v.

NORTH CAROLINA DEPARTMENT OF HEALTH AND HUMAN SERVICES,  
DIVISION OF HEALTH SERVICE REGULATION, CERTIFICATE OF  
NEED SECTION, RESPONDENT

AND

REX HOSPITAL, INC. d/b/a REX HEALTHCARE, RESPONDENT-INTERVENOR

No. COA12-364

Filed 15 January 2013

**Administrative Law—certificate of need—statutory compliance**

The North Carolina Department of Health and Human Services, Division of Health Service Regulation (DHHS) did not err by issuing a final agency decision accepting an administrative law judge's recommended decision dismissing plaintiff WakeMed's challenge to the issuance of a certificate of need ("CON") to Rex Healthcare (Rex) and awarding a CON to Rex. DHHS correctly determined that it could not apply an N.C.G.S. § 131-183 (a)(13)(a) ("Criterion 13(a)") comparison to Rex's application and correctly assessed Rex's application taking into account the reason and purpose of the law.

Appeal by petitioner from Final Agency Decision entered 24 October 2011 by the North Carolina Department of Health and Human Services. Heard in the Court of Appeals 10 October 2012.

*Smith Moore Leatherwood LLP, by Maureen Demarest Murray and Susan McNear Fradenburg, for petitioner-appellant.*

*Attorney General Roy Cooper, by Special Deputy Attorney General June S. Ferrell, for respondent-appellee.*

*K&L Gates LLP, by Gary S. Qualls and William W. Stewart, Jr., for respondent-intervenor-appellee.*

CALABRIA, Judge.

WakeMed appeals the Final Agency Decision ("FAD") of the North Carolina Department of Health and Human Services, Division of Health Service Regulation ("the Department"), awarding a certificate of need ("CON") to Rex Hospital, Inc. d/b/a Rex Healthcare ("Rex"). We affirm.

**WAKEMED v. N.C. DEP'T OF HEALTH & HUMAN SERVS.**

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I. Background

On 15 June 2010, Rex submitted a CON application (“the application”) to the Department, proposing to construct an addition to Rex Hospital in Raleigh, North Carolina. Specifically, the addition would expand and consolidate Rex’s surgical and cardiovascular services, as well as create a new main entrance and public concourse in the hospital. The application was not part of a competitive review, but rather a stand-alone application.

The Department’s CON section began its review of the application on 1 July 2010. A public hearing on the application was held on 18 August 2010. WakeMed did not have a representative at the public hearing and did not otherwise submit any comments on the application. On 29 October 2010, the CON section conditionally approved Rex’s application.

On 24 November 2010, WakeMed filed a petition for contested case hearing in the Office of Administrative Hearings challenging the CON section’s approval of the application. Rex was permitted to intervene in the case. Beginning 27 June 2011, a contested case hearing was conducted by Administrative Law Judge Beecher R. Gray (“Judge Gray”). After WakeMed presented its evidence, Rex and the Department made a joint motion to dismiss based upon WakeMed’s failure to show either substantial prejudice or agency error. Judge Gray granted the motion on both grounds and issued a Recommended Decision dismissing the case on 19 August 2011.

WakeMed appealed Judge Gray’s decision to the Department. On 24 October 2011, the Department issued a FAD which accepted Judge Gray’s Recommended Decision. The FAD dismissed WakeMed’s case and awarded the CON to Rex. WakeMed appeals.

II. Standard of Review

A CON determination will only be reversed if the appellant demonstrates that its substantial rights have been prejudiced because the decision, findings, or conclusions of the Department are:

- (1) In violation of constitutional provisions;
- (2) In excess of the statutory authority or jurisdiction of the agency;
- (3) Made upon unlawful procedure;
- (4) Affected by other error of law;



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(5) Unsupported by substantial evidence admissible under G.S. 150B-29(a), 150B-30, or 150B-31 in view of the entire record as submitted; or

(6) Arbitrary or capricious.

*Parkway Urology, P.A. v. N.C. Dep't of Health & Human Servs.*, 205 N.C. App. 529, 534, 696 S.E.2d 187, 192 (2010) (quoting *Total Renal Care of N.C., LLC v. N.C. Dep't of Health & Human Servs.*, 171 N.C. App. 734, 739, 615 S.E.2d 81, 84 (2005) (quoting N.C. Gen. Stat. § 150B-51(b) (1999))), *disc. rev. denied*, 365 N.C. 78, 705 S.E.2d 753 (2011).

The substantive nature of each assignment of error controls our review of an appeal from an administrative agency's final decision. Where a party asserts an error of law occurred, we apply a *de novo* standard of review. If the issue on appeal concerns an allegation that the agency's decision is arbitrary or [capricious] or fact-intensive issues such as sufficiency of the evidence to support [an agency's] decision we apply the whole-record test.

*Craven Reg'l Med. Auth. v. N.C. Dep't. of Health & Human Servs.*, 176 N.C. App. 46, 51, 625 S.E.2d 837, 840 (2006)(internal quotations and citation omitted).

### III. Criterion 13(a)

WakeMed argues that the Department erred in issuing a CON to Rex. Specifically, WakeMed contends that the Department failed to apply the express language of N.C. Gen. Stat. § 131-183 (a)(13)(a) ("Criterion 13(a)") to the application. We disagree.

"N.C. Gen. Stat. § 131E-183(a) charges the Agency with reviewing all CON applications utilizing a series of criteria set forth in the statute. The application must either be consistent with or not in conflict with these criteria before a certificate of need for the proposed project shall be issued." *Parkway Urology*, 205 N.C. App. at 534, 696 S.E.2d at 191-92. In the instant case, WakeMed specifically challenges the Department's conclusion that Rex's application complied with Criterion 13(a). This criterion states:

The applicant shall demonstrate the contribution of the proposed service in meeting the health-related needs of the elderly and of members of medically underserved

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groups, such as medically indigent or low income persons, Medicaid and Medicare recipients, racial and ethnic minorities, women, and handicapped persons, which have traditionally experienced difficulties in obtaining equal access to the proposed services, particularly those needs identified in the State Health Plan as deserving of priority. For the purpose of determining the extent to which the proposed service will be accessible, the applicant shall show:

- a. The extent to which medically underserved populations currently use the applicant's existing services in comparison to the percentage of the population in the applicant's service area which is medically underserved;

N.C. Gen. Stat. § 131E-183 (a)(13)(a) (2011). WakeMed argues that, in order to satisfy this criterion, Rex was required to submit an explicit comparison of "the extent to which medically underserved populations currently use the applicant's existing services" and "the percentage of the population in the applicant's service area which is medically underserved." *Id.* The Department concedes that the comparison sought by WakeMed was not included in Rex's application.

However, in the FAD, the Department declined to adopt WakeMed's statutory interpretation of Criterion 13(a) because it concluded that the comparison sought by WakeMed was impossible to apply to Rex's application. WakeMed contends that the Department's interpretation of Criterion 13(a) is erroneous because it directly conflicts with the plain language of the statute by failing to require a comparison.

Although the interpretation of a statute by an agency created to administer that statute is traditionally accorded some deference by appellate courts, those interpretations are not binding. The weight of such [an interpretation] in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control.

*Britthaven, Inc. v. N.C. Dept. of Human Resources*, 118 N.C. App. 379, 384, 455 S.E.2d 455, 460 (1995) (internal quotations and citation omitted).

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The Department based its interpretation of Criterion 13(a) on, *inter alia*, the following findings of fact:

421. N.C. Gen. Stat. § 131E-183(a)(13)(a) (“Criterion 13(a)”) requires an applicant to show the extent to which the medically underserved populations currently utilize applicant’s existing services. According to [CON Section Assistant Chief Martha] Frisone, the Agency has typically reviewed this criterion by reviewing the percentage of the facility’s total patients that fit into the various categories of “medically underserved,” such as Medicare, Medicaid, handicapped, racial and ethnic minorities and women.

422. Applicants provide their historical payor mix to demonstrate conformity to Criterion 13.

...

441. Criterion 13(a) does not have a litmus test or a specific number, either percentage or monetary amount, that must be satisfied for conformity.

...

444. All of the payor mix information presented by WakeMed at the contested case hearing was on an aggregate basis based on the particular facility as a whole and WakeMed witnesses were unable to provide any service-line specific information. This facility-wide data appears unreliable for use in any comparison under Criterion 13(a) for a number of reasons.

...

451. A meaningful comparison of the payor mix for the specific service lines proposed in Rex’s Application cannot be made because the information is not publically available.

...

453. Under Criterion 13(a), the Agency did not err in failing to make the type of payor mix percentage comparisons that WakeMed proposes should have been made.

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454. Rex's Application adequately explained and documented that it does not discriminate on the basis of income, race, ethnicity, sex, handicap, age or any other factor which might restrict access to services. Rex's Application also adequately provided its historical payor mix during FY2009 for all services at Rex as well as for each service component of the proposed project.

Thus, the Department found that the evidence presented at the CON hearing demonstrated that it could not conduct a meaningful comparison of the services proposed in Rex's application under Criterion 13(a) as proposed by WakeMed.

Our Supreme Court has explained that "[t]he language of a statute should always be interpreted in a way which avoids an absurd consequence: A statute is never to be construed so as to require an impossibility if that result can be avoided by another fair and reasonable construction of its terms." *Sheffield v. Consolidated Foods Corp.*, 302 N.C. 403, 423, 276 S.E.2d 422, 435 (1981)(internal quotations and citation omitted). Moreover, "where a literal interpretation of the language of a statute will lead to absurd results, or contravene the manifest purpose of the Legislature, as otherwise expressed, the reason and purpose of the law shall control and the strict letter thereof shall be disregarded." *Frye Reg'l Med. Ctr. v. Hunt*, 350 N.C. 39, 45, 510 S.E.2d 159, 163 (1999)(internal quotations and citation omitted). Thus, we must determine (1) whether the Department was correct that it could not apply a Criterion 13(a) comparison to Rex's application; and (2) if so, whether the Department correctly assessed Rex's application taking into account the reason and purpose of the law.

A. Facility-wide Data

WakeMed contends that the Department incorrectly determined that a comparison was not possible under Criterion 13(a) for Rex's application. WakeMed argues that the Department erred by focusing on the specific payor lines included in Rex's application because Criterion 13(a) instead "requires evaluation of the extent to which medically underserved populations currently use all of the applicant's existing services in comparison to the percentage of the population in the applicant's service area which is medically underserved," and the Department could have performed such a comparison.

To support its argument that Criterion 13(a) requires the Department to examine all of an applicant's existing services,

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WakeMed notes that subsection (a) of Criterion 13 specifically requires the CON applicant to demonstrate “[t]he extent to which medically underserved populations currently use the applicant’s existing services.” WakeMed then notes that, in contrast, subsection (c) of Criterion 13 requires the CON applicant to demonstrate “[t]hat the elderly and the medically underserved groups identified in this subdivision will be served by the applicant’s proposed services.” N.C. Gen. Stat. § 131E-183(a)(13)(a), (c). WakeMed contends that the use of the term “proposed services” in Criterion 13(c) shows that the term “existing services” in Criterion 13(a) does not refer to just the applicant’s existing proposed services, but instead refers to all of the applicant’s existing services.

However, as noted by the Department, WakeMed’s interpretation ignores the prefatory language of Criterion 13, which applies to and provides context for all of the subsequent subparts of the criterion. This language specifically states that the purpose of Criterion 13 is for “[t]he applicant [to] demonstrate the contribution of the *proposed service* in meeting the health-related needs of the elderly and of members of medically underserved groups[.]” N.C. Gen. Stat. § 131E-183(13) (2011)(emphasis added). The statute specifically directs the Department to use the information required by Criterion 13(a)-(d) “[f]or the purpose of determining the extent to which the *proposed service* will be accessible[.]” *Id.* (emphasis added). It is clear from this prefatory language that, as the Department determined in the FAD, the General Assembly intended the focus of the comparison in Criterion 13 to be in the context of the specific services being proposed in the CON application. Therefore, the Department properly concluded that “the General Assembly’s focus in Criterion 13 is upon the services being proposed in the CON application at issue, and not upon the aggregate facility-wide services that are not part of the project proposed in the CON application being reviewed.”

Moreover, the FAD contains numerous findings which demonstrate that WakeMed’s proposed comparison of facility-wide data under Criterion 13(a) would fail to provide the Department with reliable information. These findings include:

446. The aggregate facility-wide data used by WakeMed also does not take into account the different service lines at different hospitals. WakeMed witnesses, including [] Gambill and [William Stanley] Taylor, agreed that payor mixes are variable by hospital service line. Mr.

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Gambill testified that he had been able to isolate baby deliveries as being a particular service line that tended to have a higher Medicaid percentage than other service lines.

...

449. The aggregate facility-wide data used by WakeMed also does not take into account the different locations and service lines of different hospitals.

The Department's findings establish that the facility-wide data which WakeMed contends should be the basis of the comparison in Criterion 13(a) would provide no information regarding "the extent to which the proposed service will be accessible[.]" N.C. Gen. Stat. § 131E-183(13). Thus, these findings provide further support for the Department's decision to reject WakeMed's proposed interpretation of Criterion 13(a).

Finally, the FAD includes multiple findings which discuss the impact of using the comparison test proposed by WakeMed. Specifically, the Department found, based on the testimony provided by WakeMed's expert, William Stanley Taylor ("Taylor"), that "half of the hospitals in North Carolina (50%) would fail the Criterion 13(a) test that [Taylor] is requesting the Agency to apply to Rex's Application." This finding further demonstrates that the Department properly rejected WakeMed's proposed interpretation of Criterion 13(a), because WakeMed's interpretation, which would lead to half of North Carolina's hospitals being unable to qualify for a CON, clearly produces absurd results which would contravene the General Assembly's manifest purpose in enacting the CON law. Thus, WakeMed's proposed interpretation of Criterion 13(a), which would have required a comparison of an applicant's facility-wide data, violated several principles of statutory construction and the Department correctly rejected it.

B. Service-line Specific Data

In the FAD, the Department additionally concluded that it could not conduct a comparison of the specific service lines included in Rex's application. This conclusion was based upon its finding that there was no publically-available data which could form the basis of any such comparison. WakeMed does not challenge the Department's finding and there was no evidence presented at the CON hearing which conflicts with the Department's finding. Since there was no

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publically-available information available to the Department regarding the service lines included in Rex's application, there was no data for the Department to compare. Thus, the Department properly concluded that, under the circumstances of this case, no service-line specific comparison could be conducted under Criterion 13(a) due to this lack of data.

C. Prior CON Applications

WakeMed additionally argues that the Department's interpretation of Criterion 13(a) with regard to Rex's application is inconsistent with the Department's treatment of prior CON applications. Specifically, WakeMed contends that the Department previously performed a Criterion 13(a) comparison on Hillcrest Convalescent Center ("Hillcrest") and ultimately denied Hillcrest a CON based upon its failure to satisfy that criterion. However, the FAD includes multiple findings which distinguish the Hillcrest application from the Rex application:

- a. The Hillcrest review involved a nursing home facility and the predominant payor for nursing homes is Medicaid, which differs from hospitals as a whole as well as the services in Rex's application;
- b. Individual nursing homes do not differ in service lines offered as compared to hospitals that can differ dramatically in service lines which in turn causes different payor mixes among hospitals;
- c. The data to perform the comparison analysis in the Hillcrest review was publically-available, as compared to the non-public service-line data of hospitals;
- d. The data to perform the comparison analysis in the Hillcrest review related to the services at issue in that review, which differs from WakeMed's assertion that aggregate facility-wide data should be used in the review of Rex's application; and
- e. The Hillcrest facility was an aberration, having a 3% Medicaid payor mix as compared to the State average of over 60%.

These findings, which are not challenged by WakeMed, establish that there was sufficient, publically-available data for the Department to conduct a Criterion 13(a) comparison on Hillcrest's application. In

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contrast, according to the uncontroverted evidence, noted above, no such publically-available data on the service lines was included in Rex's application. This lack of information formed the basis of the Department's conclusion that it could not perform a Criterion 13(a) comparison on Rex's application. Since this was a substantial difference between Hillcrest's application and Rex's application, WakeMed has failed to demonstrate that the Department has inconsistently applied Criterion 13(a). The interpretation of Criterion 13(a) that the Department applied to Rex's application could only be applicable in a situation, such as the instant case, where a service-line comparison is not possible.

D. Purpose of the Statute

The prefatory language of Criterion 13 makes clear that the Department must focus on "the extent to which the *proposed service* will be accessible," N.C. Gen. Stat. § 131-183(a)(13) (emphasis added), rather than the applicant's services as a whole. Moreover, as demonstrated by the Department's findings, the implementation of a facility-wide comparison under Criterion 13(a) would lead to absurd consequences. Therefore, a proper comparison under Criterion 13(a) must focus on the services proposed in the CON application.

In the instant case, the Department's findings and conclusions, supported by the evidence at the CON hearing, establish that it was impossible to compare Rex's service-line specific data to medically underserved populations in Rex's service area due to a lack of available data. Since the FAD definitively established that it was impossible for the Department to conduct the comparison in Criterion 13(a), the Department was required by principles of statutory construction to disregard the literal language of Criterion 13(a) in evaluating Rex's application and instead determine whether "the reason and purpose of the law" were satisfied. *Frye Reg'l Med. Ctr.*, 350 N.C. at 45, 510 S.E.2d at 163.

In the FAD, the Department concluded that Criterion 13 "addresses the degree to which the elderly and members of medically underserved groups have and will have access to the services proposed in the CON application at issue." The Department's conclusion is consistent with the plain language of Criterion 13. In order to determine if Rex complied with this criterion, the Department examined Rex's "historical payor mix during FY2009 for . . . each component of the proposed project." The Department found that Rex did not "discriminate on the basis of income, race, ethnicity, sex, handicap, age,



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or any other factor which might restrict access to services.” Consequently, the Department concluded that “Rex’s Application adequately demonstrated that Rex provides adequate access to medically underserved populations.”

Based upon the evidence presented and the Department’s unchallenged findings, we hold that the Department properly concluded that Rex’s application complied with Criterion 13(a). Although it could not perform an explicit comparison, the Department specifically analyzed Rex’s data regarding its prior service to medically underserved individuals. The Department’s analysis adequately demonstrates that it was guided by the reason and purpose of Criterion 13 when it found Rex’s application in compliance with that criterion. WakeMed’s argument is overruled.

WakeMed does not challenge any other portion of the FAD. Since we have concluded that the Department properly concluded that Rex’s application complied with Criterion 13(a), it is unnecessary to address WakeMed’s argument that it was substantially prejudiced by an error in the Department’s approval of Rex’s CON application.

#### IV. Conclusion

The Department did not err in its interpretation of Criterion 13(a). The prefatory language of Criterion 13 makes clear that the Department must analyze that criterion in the context of the services being proposed in the CON application. Since, in the instant case, it was impossible to conduct a comparison of the specific services proposed in Rex’s application, the Department was instead required to apply the reason and purpose of Criterion 13(a) to Rex’s application. In this context, the Department properly analyzed Rex’s application to determine whether Rex provided adequate access to medically underserved populations. Based upon the findings in the FAD, the Department did not err in its conclusion that Rex’s application complied with Criterion 13(a). The FAD is affirmed.

Affirmed.

Judges HUNTER, Robert C. and HUNTER, JR., Robert N. concur.

## CASES REPORTED WITHOUT PUBLISHED OPINIONS

(FILED 15 JANUARY 2013)

ACKER v. WHOLE FOODS MKT. No. 12-757	Indust. Comm. (W81423)	Affirmed
ANDREWS v. LAND No. 12-847	Union (11CVS2887)	Affirmed
ARROWOOD v. ROBINSON No. 12-466	Haywood (10CVS1035)	Dismissed
DIXON v. GIFFORD No. 12-520	Carteret (09CVS732)	Affirmed
EDWARDS v. EDWARDS No. 12-882	Camden (08CVD72)	Affirmed
GOULD v. GOULD No. 12-662	Nash (05CVD1892)	Affirmed in part, reversed and remanded in part
HOYLE v. K.B. TOYS RETAIL, INC. No. 12-473	Forsyth (09CVS4599)	Affirmed
IN RE H.A.B. No. 12-788 Affirmed	Burke (08J22-25) (11J101)	Affirmed
IN RE I.G.R. No. 12-704	Surry (10JT64)	Reversed and Remanded
IN RE J.D.O. No. 12-884	Stanly (11JB76)	Reversed
IN RE J.R.S. No. 12-777	Alamance (08JB148)	Reversed and Remanded
IN RE M.J.J. No. 12-653	Guilford (09JB201)	Affirmed
IN RE N.E. No. 12-78	Onslow (11JB128)	Affirmed
IN RE R.A.A. No. 12-741	Columbus (10JA114-115)	Affirmed
IN RE Z.M.L. No. 12-406	Cumberland (11JB594)	Affirmed

JEMM, LLC v. CRAWFORD No. 12-683	Guilford (10CVS10577)	Dismissed in part, remanded in part.
JOHNSON v. BANK OF AM., N.A. No. 12-562	Durham (11CVS5453)	Affirmed
LITTLE v. LITTLE No. 12-414	Randolph (11CVD2345)	Reversed and Remanded
LIVE, INC. v. DOMINOS PIZZA, LLC No. 12-930	Vance (12CVS164)	Dismissed
MARTIN v. OSI REST. PARTNERS, LLC No. 12-887	Forsyth (09CVS1319)	Vacated in part, reversed and remanded in part.
MURPHY v. GOODYEAR TIRE & RUBBER CO. No. 12-871	Indust. Comm. (062227)	Affirmed
MUSANTE v. BOST CONSTR. CO. No. 12-647	Wake (09CVS18215)	Vacated and Remanded
NORDSTROM v. SHAW No. 12-917	Wake (10CVD8266)	Affirmed
ROBINSON v. LASSITER No. 12-957	Pitt (09CVD3976)	Reversed and Remanded
STATE v. ANDERSON No. 12-928	Graham (10CRS306)	Dismissed in part; no prejudicial error in part
STATE v. AVILES No. 12-698	Mecklenburg (09CRS214452-53)	No error in part; reversed and remanded in part.
STATE v. BALL No. 12-610	Henderson (09CRS52010) (09CRS52295)	No Error
STATE v. BELCHER No. 12-674	Randolph (10CRS52763-64)	No Error
STATE v. BRANCH No. 12-883	McDowell (11CR52202)	No Error
STATE v. BYRD No. 12-555	Hoke (09CRS51444) (09CRS51446)	No Error

STATE v. CARLE No. 12-389	Catawba (10CRS1108)	No Error
STATE v. COFFEY No. 12-842	Clay (09CRS50274) (10CRS50102)	No Error
STATE v. FRALEY No. 12-832	Forsyth (07CRS61262)	No Error
STATE v. GARCIA No. 12-973	Chatham (10CRS486-487) (10CRS50027) (12CRS496)	No Error
STATE v. GILLIS No. 12-339	Cabarrus (09CRS3475)	Dismissed
STATE v. GOODE No. 12-736	Catawba (10CRS54844) (12CRS1594)	Vacated and Remanded
STATE v. HERRON No. 12-300	Cleveland (11CRS432) (11CRS50435)	No Error
STATE v. HINER No. 12-881	New Hanover (10CRS56684)	No Error
STATE v. HUDSON No. 12-294	Pasquotank (10CRS51237)	No Error
STATE v. HUNT No. 12-481	Durham (10CRS51110)	No Prejudicial Error
STATE v. JACKSON No. 12-490	Durham (11CRS4627) (11CRS50603)	No Error
STATE v. JACOBS No. 12-696	Robeson (05CRS9189)	Affirmed
STATE v. LEMONS No. 12-913	Duplin (11CRS51495) (11CRS51893)	No Error
STATE v. LEONARD No. 12-570	Davidson (10CRS5632) (10CRS57890)	No Error

STATE v. LOGAN No. 12-740	Guilford (09CRS84805-06) (09CRS84808-09)	No Error
STATE v. MABERSON No. 12-227	Guilford (09CRS80879) (24517) (80884-85)	No Error in Part; Vacated in Part and Remanded for Resentencing.
STATE v. MCQUEEN No. 12-467	Hoke (08CRS52585)	Affirmed
STATE v. MULLETT No. 12-862	Wilson (11CRS4783-84)	Vacated
STATE v. NAVEY No. 12-432	Mecklenburg (11CRS204921) (11CRS30466)	No Error In Part, Dismissed Without Prejudice In Part
STATE v. PARKER No. 12-380	Wake (08CRS21285)	Affirmed
STATE v. PAUL No. 12-937	Pender (07CRS50369) (07CRS723)	Remanded for resentencing
STATE v. SANTIBANEZ No. 12-177	Sampson (08CRS50684)	No Error
STATE v. SILVER No. 12-479	Edgecombe (11CRS2292) (11CRS50402) (11CRS50406)	No error in part; judgment vacated and remanded for resentencing
STATE v. SIMMONS No. 12-834	Sampson (11CRS51238)	No Error
STATE v. STEVENS No. 12-132	Durham (10CRS55523)	No Error
STATE v. TAYLOR No. 12-652	Rutherford (07CRS51178-79)	No Error
STATE v. WADE No. 12-587	Vance (09CRS51916)	Affirmed
STATE v. WHEELER No. 12-711	Rockingham (09CRS1621-22) (09CRS52142)	No Error

STATE v. WILSON  
No. 12-655

Sampson  
(10CRS51330)

No error at trial;  
remanded for  
resentencing

STATE v. WOOD  
No. 12-355

Surry  
(09CRS963)

No Error

WARD v. WARD  
No. 12-844

Dare  
(06CVD210)

Affirmed

**CARPENTER v. CARPENTER**

[225 N.C. App. 269 (2013)]

JASON DONALD CARPENTER, PLAINTIFF

v.

JESSICA DELORES CARPENTER, DEFENDANT

No. COA12-820

Filed 5 February 2013

**Child Custody and Support—primary custody—best interests of child—insufficient findings of fact**

The trial court erred in a child custody case by failing to make sufficient findings of fact to support its conclusion that awarding primary custody of the minor child to defendant mother was in the minor child's best interest. The case was reversed and remanded to the trial court for additional findings of fact, as well as conclusions of law and decretal provisions based upon those findings.

Appeal by plaintiff from orders entered 6 January 2012 and 23 January 2012 by Judge C. Thomas Edwards in District Court, Catawba County. Heard in the Court of Appeals 10 January 2013.

*Crowe & Davis, P.A. by H. Kent Crowe, for plaintiff-appellant.*

*LeCroy Law Firm, PLLC by M. Alan LeCroy, for defendant-appellee.*

STROUD, Judge.

Jason Donald Carpenter ("plaintiff") appeals from the permanent custody order entered 6 January 2012 awarding Jessica Carpenter ("defendant") primary custody of their minor child, George,<sup>1</sup> and the trial court's order entered 23 January 2012, correcting various scrivener's errors in the initial order. The 23 January order was identical to the 6 January order other than the corrected scrivener's errors.

**I. Procedural History**

Plaintiff filed a complaint for child custody, child support, and divorce from bed and board in District Court, Catawba County on 12 May 2010. Defendant answered and filed counter-claims for the same causes of action, as well as post-separation support, alimony, and equitable distribution. After the parties failed to resolve the custody

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1. To protect the identity of the juvenile and for ease of reading we will refer to him by pseudonym.

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claims in mediation, the trial court held the custody hearing on 25 and 26 October 2011, completed the hearing on 7 and 9 November 2011, and announced the ruling on 10 November 2011. By order entered 6 January 2012, the trial court granted primary custody to defendant and secondary custody to plaintiff on a set schedule.

Plaintiff filed notice of appeal to this Court on 2 February 2012. The trial court entered an “Amended Child Custody and Child Support Order” on 23 January 2012, which makes minor and non-substantive changes to the 6 January 2012 order. As there was no motion to amend the order, it appears that the trial court amended the order *ex mero motu*. The Plaintiff filed another notice of appeal on 27 February 2012, noting appeal to both the original and amended orders. Despite the plaintiff’s first notice of appeal, the trial court had jurisdiction to enter the Amended Order under N.C. Gen. Stat. § 1A-1, Rule 60(a)<sup>2</sup>. We will therefore consider plaintiff’s appeal based upon the 23 January 2012 amended order.

## II. Custody Order

Plaintiff argues that the trial court failed to make sufficient findings of fact to support its conclusion that awarding primary custody of George to defendant was in the minor child’s best interest. We agree.

In a child custody case, the trial court’s findings of fact are conclusive on appeal if supported by substantial evidence, even if there is sufficient evidence to support contrary findings. Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. Unchallenged findings of fact are binding on appeal. The trial court’s conclusions of law must be supported by adequate findings of fact. . . . Absent an abuse of discretion, the trial court’s decision in matters of child custody should not be upset on appeal.

*Peters v. Pennington*, \_\_\_ N.C. App. \_\_\_, \_\_\_, 707 S.E.2d 724, 733 (2011) (citations and quotation marks omitted). Whether those findings of fact support the trial court’s conclusions of law is reviewable *de novo*. *Hall v. Hall*, 188 N.C. App. 527, 530, 655 S.E.2d 901, 904 (2008).

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2. Clerical mistakes in judgments, orders or other parts of the record and errors therein arising from oversight or omission may be corrected by the judge at any time on his own initiative or on the motion of any party and after such notice, if any, as the judge orders. During the pendency of an appeal, such mistakes may be so corrected before the appeal is docketed in the appellate division, and thereafter while the appeal is pending may be so corrected with leave of the appellate division.” N.C. Gen. Stat. § 1A-1, Rule 60(a).



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Findings of fact regarding the competing parties must be made to support the necessary legal conclusions. These findings may concern physical, mental, or financial fitness or any other factors brought out by the evidence and relevant to the issue of the welfare of the child. However, the trial court need not make a finding as to every fact which arises from the evidence; rather, the court need only find those facts which are material to the resolution of the dispute.

*Witherow v. Witherow*, 99 N.C. App. 61, 63, 392 S.E.2d 627, 629 (1990) (citations and quotation marks omitted), *aff'd*, 328 N.C. 324, 401 S.E.2d 362 (1991).

Plaintiff does not challenge any of the trial court's findings of fact, so they are binding on appeal. *Peters*, \_\_\_ N.C. App. at \_\_\_, 707 S.E.2d at 733. Plaintiff's only argument on appeal is that the trial court made insufficient findings to support its conclusions of law. Plaintiff argues that the trial court failed to resolve the "questions raised by the evidence," and that "[w]here the trial court appears to implicitly resolve issues raised by the testimony of the parties, but the resolution of those issues is not reflected in the findings of fact, the appellate court has no basis upon which to determine how the trial court reached its decision."

Defendant's brief gives short shrift to Plaintiff's contentions, taking only 3 pages to present her argument that the trial court's findings are adequate to support the conclusions of law, relying entirely upon *Hall v. Hall*. Quoting *Hall*, 188 N.C. App. at 530, 655 S.E.2d at 904, defendant notes that "where the trial court 'finds that both parties are fit and proper to have custody, but determines that it is in the best interest of the child for one parent to have primary physical custody, as it did here, such determination will be upheld if it is supported by competent evidence.'" Although this statement of the law is correct, Defendant's reliance on *Hall* is misplaced. In *Hall*, the defendant argued that

some of the trial court's findings of fact were "mere conclusions." Specifically, defendant argue[d] that four of the trial court's findings of fact were not findings of fact, but mere conclusions. Assuming, arguendo, that those findings of fact were only conclusions, the record still contains findings of fact, not challenged by defendant or already determined to be supported by competent evi-

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dence by this Court, to support the trial court's "best interest" determination.

*Id.* at 532, 655 S.E.2d at 905. The *Hall* court then noted the specific findings of fact not challenged on appeal that would have supported the trial court's conclusions even in the absence of the contested findings. *Id.* at 532-33. The unchallenged findings of fact in *Hall* show quite clearly why the trial court concluded that an award of primary custody to the plaintiff was in the child's best interest.

Specifically, finding of fact number eight states that plaintiff "took the children for haircuts, bought their clothes and school supplies, volunteered at their school and was a room mother, and took the children on play dates." The trial court also found that plaintiff took the children to the doctor and stayed home with them when they were ill. Finally, the trial [court] found as a fact that plaintiff took a six month leave of absence from her employment to stay with Christiana when she was born and a five month leave when Steven was born.

Contrary to these findings, the trial court found that defendant would only "occasionally take the children to the doctor, would sometimes attend birthday parties and would volunteer at school on occasion." Moreover, "[d]efendant's work schedule was unpredictable and he was regularly out of town one to three nights each week." The trial court also found that "[d]efendant countermanded [p]laintiff on a number of occasions when she ... was disciplining the children [,]" referred to Christiana as a " 'drama queen,' " and Steven as a " 'Mama's boy.' " Finally, the trial court found that "[d]efendant 'body slammed' the [p]laintiff 20 to 50 times during the marriage[, and] threatened to punch his brother-in-law in the nose." Under N.C. Gen.Stat. § 50-13.2(a), a relevant factor in making a custody determination is "acts of domestic violence between the parties[.]" Under such circumstances, we cannot say that the trial court committed a manifest abuse of discretion in awarding plaintiff primary physical custody of the children. Although defendant argues that the trial court should have made less complimentary findings as to plaintiff, we are not in a position to re-weigh the evidence.

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*Id.* (footnote omitted).

Defendant also incorrectly identifies the standard of review applicable to the issue of whether the findings of fact support the conclusions of law as abuse of discretion, arguing that “[t]here was obviously no manifest abuse of discretion on the trial court’s part in awarding [George]’s primary custody to the Appellee/mother.” The proper standard of review is *de novo*: “Whether those findings of fact support the trial court’s conclusions of law is reviewable *de novo*.” *Id.* at 530, 655 S.E.2d at 904 (citation omitted).

Although a custody order need not, and should not, include findings as to each piece of evidence presented at trial, it must resolve the material, disputed issues raised by the evidence.

[A] custody order is fatally defective where it fails to make detailed findings of fact from which an appellate court can determine that the order is in the best interest of the child, and custody orders are routinely vacated where the “findings of fact” consist of mere conclusory statements that the party being awarded custody is a fit and proper person to have custody and that it will be in the best interest of the child to award custody to that person. A custody order will also be vacated where the findings of fact are too meager to support the award.

*Dixon v. Dixon*, 67 N.C. App. 73, 76-77, 312 S.E.2d 669, 672 (1984) (citations omitted).

The quality, not the quantity, of findings is determinative. This custody order contains eighty findings of fact, but Plaintiff correctly notes that many of the findings of fact are actually recitations of evidence which do not resolve the disputed issues. The findings also fail to resolve the primary issues raised by the evidence which bear directly upon the child’s welfare. As noted in *Dixon*,

the findings in a custody order “bearing on the party’s fitness to have care, custody, and control of the child and the findings as to the best interests of the child must resolve all questions raised by the evidence pertaining thereto.” *In re Kowalzek*, 37 N.C.App. 364, 370, 246 S.E.2d 45, 48 (1978). In *Kowalzek*, the court found that questions concerning the wife’s leaving her husband and child, and her subsequent failure to inquire about her child for several months after being notified of her hus-

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band's death were not resolved in the order awarding her custody, and the order was vacated.

*Id.* at 78.

The primary disputed issues regarding the child's welfare in this case were defendant's allegations of excessive alcohol consumption by plaintiff, conflicts in the parties' parenting styles, and George's resulting anxiety. The order makes findings regarding the evidence and contentions of each party on these issues, but resolves few of them.

One area of dispute which may bear directly upon the child's welfare is the extent of consumption of alcoholic beverages by each party.<sup>3</sup> Defendant alleged in her custody counterclaim that plaintiff drinks to excess frequently and that his drinking has interfered with his relationship with George:

J. Since the parties separated, the Plaintiff has called [George] once per day between 9:30 p.m. and 10:00 p.m., which is after the start of his bedtime routine and the conversation between the Plaintiff and [George] has never lasted more than two minutes. On several occasions when the Plaintiff has called, his speech has been slurred due to alcohol consumption and/or the call was placed from a bar.

K. The Plaintiff consumes excessive quantities of alcohol. Upon the Defendant's information and belief he consumes at least 24 beers every day and a half. Thursday through Sunday the Plaintiff drinks to the point of obvious intoxication.

Of course, plaintiff denied these allegations in his reply and at trial. The parties presented extensive evidence regarding these contentions, and the trial court made numerous findings which mention alcohol consumption:

29. The extent of Mr. Carpenter's consumption of malt beverages is in some dispute although he acknowledges drinking with some frequency and alcohol was involved

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3. N.C. Gen. Stat. § 50-13.2(b2) (2012) was added to § 50-13.2 as of 1 December 2012 to provide that "Any order for custody, including visitation, may, as a condition of such custody or visitation, require either or both parents, or any other person seeking custody or visitation, to abstain from consuming alcohol[.]" Although this statutory provision was not in effect at the time of the trial court's order, this amendment indicates that the General Assembly has recognized the importance of alcohol abuse in a custody case.

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when he wrecked a 4-wheeler in 2010. Mr. Carpenter has vacationed at the beach in July 2010 and July 2011.

. . . .

34. The Plaintiff, Jason Donald Carpenter's mother has been in rehabilitation associated with the misuse of alcoholic beverages on several occasions including two times in the past two years.

35. The Plaintiff, the Defendant and Josh Sigmon socialized at the parties' former marital residence. Socialization involved the consumption of alcoholic beverages. Mr. Sigmon acknowledges having seen Mr. Carpenter drunk on a few occasions and reports having seen Ms. Carpenter drunk at some time. Ms. Carpenter was the designated driver for Mr. Carpenter and Mr. Sigmon and others at other times. There is no evidence that Mr. Carpenter was ever a designated driver.

. . . .

40. That Ms. Caulder [defendant's mother] reports that the separation of the parties in February 2010 was occasioned by the Defendant telephoning and advising that Jason had demanded that she, Jessica, and [George] leave the house which was associated with Jason's consumption of alcohol.

. . . .

43. Marcus Setzer is a 21 year old resident of Claremont, North Carolina, who worked at Rock Barn Country Club with the Plaintiff. Mr. Setzer and the Plaintiff enjoyed hunting, 4 -wheeling and drinking although, drinking is usually contraindicating [sic] for hunting and 4-wheeling activities.

. . . .

57. Both the Plaintiff and the Defendant consumed alcoholic beverage during their marriage. The Defendant contending that the Plaintiff consumed beer in greater quantities than did she.

58. The Plaintiff frequently took hunting and fishing trips and Mr. Carpenter frequently shared after work

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companionship with his friends Lane, David, Josh, Stan and others in the attached garage at the former marital residence which was frequently accompanied by the consumption of malt beverages.

None of these findings resolve the real issue, which upon the pleadings and evidence in this case was whether plaintiff abuses alcohol to an extent that it may have an adverse effect upon George. Findings 35 and 40 are recitations of testimony by various witnesses about their observations of plaintiff and are not really findings of fact. Findings 29 and 57 recognize the existence of dispute between the parties as to the extent of plaintiff's drinking. Finding 34 does not address the parties at all and fails to explain why plaintiff's mother's problems with alcohol abuse may be relevant to the issue of custody of George. Findings 43 and 58 show that plaintiff at some point in time has gone hunting, fishing and four-wheeling with his friends and has consumed alcohol during these activities.

The findings merely recognize the existent of a dispute and some evidence which may bear upon that dispute without resolving it. There are no findings that either party actually does abuse alcohol or that either party's drinking has adversely affected George, although the findings tend to indicate that the plaintiff drinks more than defendant and that his drinking has caused at least one adverse consequence, the wreck of a 4-wheeler in 2010. As the trial court ordered that neither party consume alcohol in George's presence, the trial court may have had some concern about the potential effect upon George, but the findings fail to resolve the issue.

Another area of dispute was the different parenting styles of the parties and their communication difficulties. Plaintiff argues that the trial court failed to explain why awarding defendant custody is in George's best interest, given that there were negative findings about defendant and that "[t]he evidence presented during the hearing favors Plaintiff with respect to his job situation and certainly the child's emotional situation as it is exemplified by this asinine practice of sleeping with parents." Essentially, the trial court found that the parties do have different parenting styles and that the parties' communication difficulties have caused George anxiety. The trial court also found that the parties disagree on the practice of sleeping with George and that the absence of a resolution to this dispute is harmful to George; the trial court has the authority to resolve this dispute but failed to do so. Although we do not necessarily agree with plaintiff's characterization of the evidence as "favoring" him, the trial court did

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make negative findings about both parties in regard to the child's emotional welfare. For example, the trial court found as follows:

47. Ms. Carpenter did not advise Mr. Carpenter of [school counselor] Ms. Totty's counseling with [George]. When Mr. Carpenter was apprised of the ongoing counseling he was upset and communicated with Ms. Totty about his concerns involving being left out of the loop, but did not impede or frustrate Ms. Totty's continuing counseling with [George]. Ms. Totty saw [George] about ten times during his kindergarten year and has seen [George] one or two times this year. Ms. Totty reports that it is apparent that [George] loves his father.

....

49. Ms. Hoffman's findings in [psychological] counseling with [George] are consistent with external observations of the Plaintiff and the Defendant, that is to say the Plaintiff is more prone to be firm in his parenting style while the Defendant is more prone to [casual] as her parenting style. Ms. Hoffman has had eight consultations with [George].

....

51. The inconsistent parenting styles of the Plaintiff and Defendant have not been adequately addressed by the Defendant or the Plaintiff such that [George] can have some measure of consistency when he is in the physical custody of either parent.

52. The counselor made suggestions that [George] should continue to sleep with his mother and begin to sleep with his father are likely to cause long term issues for [George] unless the Plaintiff and the Defendant moderate their differences.

....

59. Both the Plaintiff and the Defendant love [George] but each expresses a manifest [sic] of love in polar opposite manners.

....

71. The Defendant's lack of gainful employment outside of the home and her failure to make diligent efforts to

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become employed after [George] began school in August 2010 have led her to adopt a posture of being over engrossed in and overly protective of [George].

....

80. The efforts of the Plaintiff and Defendant to attend co-parenting classes in the fall of 2011 have fallen by the wayside.

In contrast to the issue of alcohol consumption, where the findings to favor defendant, here the findings favor plaintiff to some extent. Although the findings regarding George's counseling not quoted above are primarily recitations of evidence, overall the order indicates that defendant has interfered with plaintiff's relationship with George and his participation in counseling and has been overly protective of George. For example, finding 52, regarding the hotly contested issue of co-sleeping, appears to be at least in part a recitation of evidence and not a true finding, as it simply states what the counselor suggested. The only positive finding seems to be that both parties love George, which is not disputed by either party. Again, these findings do not shed any light upon the rationale for the trial court's ultimate conclusion of what is in George's best interest.

The order addresses other disputed issues, such as the residential situations of each party and their financial provision for George, in similar fashion, without relating the findings to George's needs or best interest. It is difficult to discern the meaning of some of the findings, or at least how the findings relate to the child's welfare. For example, finding 79 states that "Jessie Wayne Haynes is a 22 year old friend of the Plaintiff. Traci Sigmon is a 25 year old friend of the Plaintiff. Both are males." There is no other mention of either of these persons in the order, so we do not know why they are mentioned or what they have to do with George. Finding 72 states that "[George] has returned from visitation with his father with muddy shoes and dirty clothes." We are unable to discern if this is a positive finding, as it may indicate that plaintiff has been engaging in healthy outdoor activities with his son, or if it is negative, as it may indicate that plaintiff has failed to properly address the child's hygiene issues. Perhaps it is both.

Overall, the trial court's findings of fact do not resolve the primary disputes between the parties and do not explain *why* awarding primary custody of George to defendant is in George's best interest, and for this reason we must reverse the order and remand to the trial



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court for additional findings of fact, as well as conclusions of law and decretal provisions based upon those findings.

The findings should resolve the material disputed issues, or if the trial court does not find that there was sufficient credible evidence to resolve an issue, should so state. *See Woncik v. Woncik*, 82 N.C. App. 244, 248, 346 S.E.2d 277, 279 (1986) (“[A]s is true in most child custody cases, the determination of the evidence is based largely on an evaluation of the credibility of each parent. Credibility of the witnesses is for the trial judge to determine, and findings based on competent evidence are conclusive on appeal, even if there is evidence to the contrary.” (citations omitted)). The findings of fact should resolve the disputed issues clearly and relate these issues to George’s welfare; the conclusions of law must rest upon the findings of fact. *See id.*; *Coble v. Coble*, 300 N.C. 708, 714, 268 S.E.2d 185, 190 (1980).

This remand may be a Pyrrhic victory for plaintiff, as the evidence presented at trial was more than adequate to support findings of fact which would support a conclusion of law that granting primary custody to defendant is in George’s best interest, but this Court is not at liberty to make this determination.

Our decision to remand this case for further evidentiary findings is not the result of an obeisance to mere technicality. Effective appellate review of an order entered by a trial court sitting without a jury is largely dependent upon the specificity by which the order’s rationale is articulated. Evidence must support findings; findings must support conclusions; conclusions must support the judgment. Each step of the progression must be taken by the trial judge, in logical sequence; each link in the chain of reasoning must appear in the order itself. Where there is a gap, it cannot be determined on appeal whether the trial court correctly exercised its function to find the facts and apply the law thereto.

*Coble*, 300 N.C. at 714, 268 S.E.2d at 190.

On remand, the trial court shall make additional findings of fact based upon the evidence presented at the trial.<sup>4</sup> As additional guidance on remand, we also note that the trial court’s order did not actu-

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4. We do *not*, as requested by plaintiff on appeal, vacate the trial court’s order and remand “for a new trial.” The record contains sufficient evidence to support findings of fact and conclusions of law supporting an award of primary custody to defendant; the trial court simply failed to make those findings.

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ally state that it was granting “joint custody” to the parties, but instead provided as follows:

1. [George] is placed in the primary care, custody and control of the Defendant, Jessica Delores Carpenter.
2. [George] is placed in the secondary care, custody and control of the Plaintiff, Jason Donald Carpenter[.]

The order then sets forth a detailed schedule for physical custody of George.<sup>5</sup> The order also provides that each party will have full access to George’s medical, dental, and educational information, although this would be true even in the absence of this provision. *See* N.C. Gen. Stat. § 50-13.2(b) (2011) (“Absent an order of the court to the contrary, each parent shall have equal access to the records of the minor child involving the health, education, and welfare of the child.”) The order appears to grant joint legal and physical custody of George to the parties, but the order never mentions legal custody, although it does mention “control” as part of its decree, which may imply “legal custody.”<sup>6</sup> *See Peters*, \_\_\_ N.C. App. at \_\_\_, 707 S.E.2d at 736 (“Legal custody refers generally to the right and responsibility to make decisions with important and long-term implications for a child’s best interest and welfare.” (citations and quotation marks omitted)). We note that joint custody

implies a relationship where each parent has a degree of *control* over, and a measure of responsibility for, the child’s best interest and welfare. Nevertheless, in the absence of a controlling statutory definition . . . of the term ‘joint custody,’ difficulties may arise where the . . . [court] use[s] the term without detailing the means of its implementation.

*Patterson v. Taylor*, 140 N.C. App. 91, 96, 535 S.E.2d 374, 378 (2000) (emphasis added) (citation omitted).<sup>7</sup> Given the substantial commu-

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5. We have treated the order as granting joint legal and physical custody in this opinion, as the parties have not argued otherwise on appeal.

6. In contrast to this custody order, we note that the temporary custody order entered by the trial court on 4 November 2012 did specifically grant “joint legal custody” to both parties and “primary legal custody” to defendant as well as setting out the schedule for plaintiff’s physical custody of George.

7. Chapter 50 does not define “legal custody” or “joint custody.” N.C. Gen. Stat. § 48-1-101(9) (2011) defines “legal custody” as “the general right to exercise continuing care of and control over the individual as authorized by law, with or without a court order, and: a. Includes the right and the duty to protect, care for, educate, and discipline the indi-

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nication difficulties and different parenting styles of the parties, on remand it may be advisable for the trial court to define its grant of legal and physical custody of George more clearly, as failure to do so may increase the opportunities for discord between the parties.

REVERSED AND REMANDED.

Judges HUNTER, JR., Robert N. and DAVIS concur.

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LARRY DONNELL GREEN, BY AND THROUGH HIS GUARDIAN AD LITEM, SHARON CRUDUP; LARRY ALSTON, INDIVIDUALLY, AND RUBY KELLY, INDIVIDUALLY, PLAINTIFFS  
v.  
WADE R. KEARNY, II; PAUL KILMER; KATHERINE ELIZABETH LAMELL; PAMELA BALL HAYES[;] RONNIE WOOD[;] PHILLIP GRISSOM, JR.; DR. J.B. PERDUE, INDIVIDUALLY, AND IN HIS OFFICIAL CAPACITY AS MEDICAL EXAMINER OF FRANKLIN COUNTY; LOUISBURG RESCUE AND EMERGENCY MEDICAL SERVICES, INC.; FRANKLIN COUNTY EMERGENCY MEDICAL SERVICES; EPSOM FIRE AND RESCUE ASSOCIATION, INC.; AND FRANKLIN COUNTY, NORTH CAROLINA,  
A BODY POLITIC, DEFENDANTS

No. COA12-678

Filed 5 February 2013

**1. Costs—negligent infliction of emotional distress—summary judgment—plaintiffs still parties**

The trial court did not lack the authority to find plaintiffs Alston and Kelly liable for costs incurred after the trial court granted summary judgment in favor of defendants with respect to plaintiffs' negligent infliction of emotional distress claims. As plaintiffs Alston and Kelly never requested the trial court to issue a final judgment as to them, under the plain language of Rule 54(b), they remained parties to the action and remained liable for costs incurred throughout the pendency of this case.

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vidual; b. Includes the right and the duty to provide the individual with food, shelter, clothing, and medical care; and c. May include the right to have physical custody of the individual." N.C. Gen. Stat. § 48-1-101(12) (2011) defines "physical custody" as "the physical care of and control over an individual." Although these definitions are not controlling here, the fact that they both include some measure of control demonstrates why the trial court's use of the term "care, custody, and control" in the decretal portion of the order is confusing without use of the terms "legal custody" or "physical custody" and additional detail.

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**2. Costs—negligent infliction of emotional distress—after summary judgment granted—not contrary to public policy**

The trial court's order taxing costs against plaintiffs which were incurred after the trial court granted summary judgment in favor of defendants with respect to plaintiffs' claims was not contrary to public policy encouraging settlements. Plaintiffs' argument rested on the rights of a hypothetical set of parties who, after having settled, are taxed with costs incurred after the settlement of their claims, and the Court does not give advisory opinions.

**3. Costs—negligent infliction of emotional distress—motion timely filed**

The trial court did not err in taxing costs against plaintiffs in a negligent infliction of emotional distress claim as defendants' motion was filed within a reasonable time after the results of the litigation were known.

**4. Costs—not taxed against guardian ad litem**

Plaintiffs' argument that the trial court erroneously taxed costs against Mr. Green's guardian ad litem was without merit as the trial court did not tax costs against the guardian ad litem.

Judge STEELMAN, concurring in part and dissenting in part.

Appeal by plaintiffs from order entered 8 February 2010 by Judge Henry W. Hight, Jr., in Franklin County Superior Court. Heard in the Court of Appeals 22 October 2012.

*Bell & Vincent-Pope, P.A., by Judith M. Vincent-Pope, for Plaintiff-appellants.*

*Troutman Sanders LLP, by Gary S. Parsons and Whitney S. Waldenberg, for Defendant-appellees Hayes, Wood, and Louisburg Rescue.*

*Young Moore and Henderson, P.A., by David M. Duke, Brian O. Beverly, and Michael Rainey, for Defendant-appellee Kearney.*

ERVIN, Judge.

Plaintiffs Larry Donnell Green, through his guardian *ad Litem* Sharon Crudup; Larry Alston; and Ruby Kelly appeal from an order granting a motion for costs filed by Defendants Wade R. Kearney, II; Pamela Ball Hayes; Ronnie Wood; and Louisburg Rescue and

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Emergency Services, Inc. On appeal, Plaintiffs contend that the trial court erroneously granted Defendants' motion for costs on the grounds that (1) the trial court lacked authority to find Mr. Alston or Ms. Kelly liable for costs incurred after the trial court granted summary judgment in favor of Defendants with respect to Mr. Alston and Ms. Kelly's negligent infliction of emotional distress claims; (2) Defendants' motion for costs was untimely; and (3) the order taxing costs against Mr. Alston and Ms. Kelly was contrary to public policy. In addition, Plaintiffs argue that, to the extent, if any, that the trial court taxed costs against Ms. Crudup, it lacked the authority to do so. After careful consideration of Plaintiff's challenges to the trial court's order in light of the record and the applicable law, we conclude that the trial court did not err by taxing costs against Mr. Alston and Ms. Kelly, that the trial court did not tax costs against Ms. Crudup, and that the trial court's order should be affirmed.

**I. Factual Background****A. Substantive Facts**

The present proceeding represents the third time that this Court has been called upon to consider issues arising from an accident in which Mr. Green was injured on 24 January 2005. *See Green v. Kearney*, 203 N.C. App. 260, 262, 690 S.E.2d 755, 758-59 (2010) ("*Green I*"), and *Green v. Kearney*, \_\_\_ N.C. App. \_\_\_, 719 S.E.2d 137 (2011) ("*Green II*"). We summarized the underlying facts in our opinion in *Green I* as follows:

The facts as alleged in plaintiffs' complaint show that on 24 January 2005, at approximately 8:53 p.m., emergency services were dispatched in Franklin County, North Carolina to the scene of an accident involving a pedestrian—Green—and a motor vehicle. Green suffered an open head wound as a result of the accident. Defendant Wade Kearney ("Kearney") with the Epsom Fire Department was the first to arrive at the scene and checked Green for vital signs. Kearney determined that Green was dead and did not initiate efforts to resuscitate him.

Several minutes later, defendants Paul Kilmer ("Kilmer") and Katherine Lamell ("Lamell") with Franklin County EMS arrived. Kearney asked Kilmer to verify that Green did not have a pulse, but Kilmer declined to do so, stating that Kearney had already checked and that was suf-

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ficient. Without checking the pupils or otherwise manually rechecking for a pulse, Kearney and Kilmer placed a white sheet over Green's body.

At approximately 9:00 p.m., defendants Pamela Hayes ("Hayes") and Ronnie Wood ("Wood") with the Louisburg Rescue Unit arrived at the scene. After being informed by Kearney and Kilmer that Green was dead, neither Hayes nor Wood checked Green for vital signs. At around 9:31 p.m., Perdue, the Franklin County Medical Examiner, arrived at the scene. He first conducted a survey of the scene, taking notes regarding the location of Green's body and the condition of the vehicle that struck him. Once the Crime Investigation Unit arrived, Perdue inspected Green's body. While Perdue was examining Green, eight people saw movement in Green's chest and abdomen. Kearney asked Perdue whether Green was still breathing and Perdue responded: "That's only air escaping the body." Once Perdue finished examining Green, he directed that Green should be taken to the morgue located at the Franklin County jail.

At approximately 10:06 p.m., Green was transported to the morgue by Hayes and Wood where Perdue examined him. Perdue lifted Green's eyelids, smelled around Green's mouth to determine the source of an odor of alcohol that had been previously noted, and drew blood. During this particular examination, Perdue, Hayes, and Wood all observed several twitches in Green's upper right eyelid. Upon being asked if he was sure Green was dead, Perdue responded that the eye twitch was just a muscle spasm. Plaintiffs claim that Hayes did not feel comfortable with Perdue's response and went outside to report the eye twitch to Lamell. Hayes then returned inside and asked Perdue again if he was sure Green was dead. Perdue reassured Hayes that Green was, in fact, dead. Green was then placed in a refrigeration drawer until around 11:23 p.m. when State Highway Patrolman Tyrone Hunt ("Hunt") called Perdue and stated that he was trying to ascertain the direction from which Green was struck. To assist Hunt, Perdue removed Green from the drawer and unzipped the bag in which he was sealed. Perdue then noticed movement in Green's

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abdomen and summoned emergency services. Green was rushed to the hospital where he was treated from 25 January 2005 to 11 March 2005. Green was alive at the time this action was brought. His exact medical condition is unknown, though plaintiffs allege that he suffered severe permanent injuries.

*Green I*, 203 N.C. App. at 262, 690 S.E.2d at 758-59. "There is no dispute that Mr. Green was immediately disabled by his injuries." *Green II*, \_\_\_ N.C. App. at \_\_\_, 719 S.E.2d at 139.

**B. Procedural History**

On 22 May 2008, Ms. Crudup was appointed to serve as Mr. Green's guardian *ad Litem*. On the same date, Plaintiffs filed a complaint against Defendants Wade R. Kearney, II; Paul Kilmer; Katherine Lamell; Pamela Hayes; Ronnie Wood; Philip Grissom, Jr.; Dr. J.B. Perdue, both individually and in his official capacity as Medical Examiner for Franklin County; Louisburg Rescue and Emergency Medical Service, Inc.; Franklin County Emergency Medical Service, Inc.; Epsom Fire and Rescue Association, Inc.; and Franklin County, North Carolina. In the complaint, Mr. Green asserted negligence claims and Ms. Kelly and Mr. Alston asserted negligent infliction of emotional distress claims against all Defendants.

At different times and in different ways, each of Plaintiffs' claims was resolved. On 6 July 2009, a settlement between Plaintiffs and Defendants Franklin County EMS, Mr. Kilmer, Ms. Lamell, and Franklin County received judicial approval. On 12 March 2009, a dismissal motion filed by Defendants Epsom Fire and Rescue Association, Inc., and Philip Grissom, Jr., was granted. On 23 July 2008, Dr. Perdue filed a motion to dismiss the claims that had been asserted against him on the grounds that he was immune from suit. The trial court denied Dr. Perdue's motion on 12 March 2009, a decision from which Dr. Perdue noted an appeal to this Court. On 6 April 2010, this Court issued an opinion reversing the denial of Dr. Perdue's dismissal motion on the grounds that Dr. Perdue was entitled to rely on a defense of sovereign immunity with respect to any claim filed against him in his official capacity and that Plaintiffs' complaint did not adequately assert a claim against Dr. Perdue in his individual capacity. *Green I*, 203 N.C. App. at 275, 690 S.E.2d at 766.

On 29 July 2008 and 1 August 2008, the remaining Defendants, Mr. Kearney, Ms. Hayes, Mr. Wood, and Louisburg Emergency Medical Services, a group which will be referred to collectively throughout

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the remainder of this opinion as “Defendants,” sought dismissal of Plaintiffs’ complaint. On 9 December 2008, Defendants filed answers denying the material allegations of Plaintiffs’ complaint, asserting various defenses, and reiterating their request for dismissal of Plaintiffs’ complaint. On 1 December 2008 and 30 December 2008, Defendants’ dismissal motions were denied. On 3 February 2009, Defendants moved for partial summary judgment with respect to the negligent infliction of emotional distress claims asserted by Mr. Alston and Ms. Kelly, which were the only claims underlying their requests for relief. On 12 March 2009, orders granting summary judgment in favor of Defendants with respect to these negligent infliction of emotional distress claims were entered. Plaintiffs never sought appellate review of the orders granting summary judgment in Defendants’ favor with respect to these claims.

On 25 March 2009, an order was entered directing that “all matters in this legal proceeding [be] stayed pending the final opinion in Defendant Perdue’s appeal to the North Carolina Court of Appeals.” On 6 April 2010, this Court filed its opinion holding that Dr. Perdue’s dismissal motion should have been granted. *Green I*, 203 N.C. App. at 275, 690 S.E.2d at 766. On 15 and 16 November 2010, Defendants moved for summary judgment in their favor with respect to Plaintiffs’ remaining claim. On 20 December 2010, orders granting Defendants’ motion were entered.

On 28 December 2010, Defendants filed a motion seeking an award of costs. On 10 January 2011, Plaintiffs noted an appeal from the order granting summary judgment with respect to their remaining claim against Defendants. On 15 November 2011, this Court filed an opinion in *Green II* affirming the entry of summary judgment in favor of Defendants. *Green II*, \_\_\_ N.C. App. at \_\_\_, 719 S.E.2d at 146. Pursuant to N.C. R. App. P. 31 and 32, the time within which Plaintiffs were allowed to seek discretionary review of our decision in *Green II* expired on 20 December 2011. On 3 January 2012, Defendants filed a supplemental motion for the assessment of costs. After holding a hearing with respect to Defendants’ motion on 30 January 2012, the trial court entered an order on 8 February 2012 taxing costs against Plaintiffs and in favor of Defendants Ms. Hayes, Mr. Wood and Louisburg EMS in the amount of \$12,030.15 and taxing costs against Plaintiffs and in favor of Defendant Mr. Kearney in the amount of \$8,327.36. Plaintiffs noted an appeal to this Court from the trial court’s order.



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II. Legal AnalysisA. Standard of Review

“ ‘The simple but definitive statement of the rule is: costs in this State, are entirely creatures of legislation, and without this they do not exist.’ ” *Belk v. Belk*, \_\_\_ N.C. App. \_\_\_, \_\_\_, 728 S.E.2d 356, 363 (2012) (quoting *City of Charlotte v. McNeely*, 281 N.C. 684, 691, 190 S.E.2d 179, 185 (1972) (internal citation omitted)). “Whether a trial court has properly interpreted the statutory framework applicable to costs is a question of law reviewed *de novo* on appeal. The reasonableness and necessity of costs is reviewed for abuse of discretion.” *Peters v. Pennington*, \_\_\_ N.C. App. \_\_\_, \_\_\_, 707 S.E.2d 724, 741 (2011) (citing *Jarrell v. Charlotte-Mecklenburg Hosp. Auth.*, 206 N.C. App. 559, 561, 698 S.E.2d 190, 191 (2010)).

In challenging the trial court’s order, Plaintiffs have not argued that the trial court abused its discretion in establishing the amount of costs to be assessed against them or contended that the trial court lacked the authority to assess the types of costs claimed by Defendants. Instead, Plaintiffs assert that the trial court lacked the authority to tax costs against Mr. Alston and Ms. Kelly to the extent that Defendants incurred those costs after summary judgment had been entered in favor of Defendants with respect to their negligent infliction of emotional distress claims, that the trial court’s decision to hold Mr. Alston and Ms. Kelly liable for costs incurred after summary judgment had been entered in favor of Defendants with respect to their negligent infliction of emotional distress claims contravened North Carolina public policy, that Defendants failed to seek to have costs taxed against Plaintiffs in a timely manner, and that the trial court erroneously taxed costs against Ms. Crudup. As a result of the fact that the questions raised by Plaintiffs all involve questions of law, we review Plaintiffs’ challenges to the trial court’s order using a *de novo* standard of review.

B. Taxing Costs Against Ms. Kelly and Mr. Alston

[1] As an initial matter, Plaintiffs argue that, after the trial court entered summary judgment in Defendants’ favor with respect to their negligent infliction of emotional distress claim, Mr. Alston and Ms. Kelly were no longer parties to this case, a fact which deprived the trial court of the right to tax costs incurred after the entry of the summary judgment order against them. We do not find Plaintiffs’ argument persuasive.

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Admittedly, “the party cast in the suit is the one upon whom the costs must fall.” *Nichols v. Goldston*, 231 N.C. 581, 584, 58 S.E.2d 348, 351 (1950) (citing N.C. Gen. Stat. § 6-1 and *Ritchie v. Ritchie*, 192 N.C. 538, 541, 135 S.E. 458, 459 (1926)). However, Plaintiffs’ assumption that Mr. Alston and Ms. Kelly were not parties after the entry of the summary judgment order is contrary to the explicit language of N.C. Gen. Stat. § 1A-1, Rule 54(b), which provides, in pertinent part, that:

When more than one claim for relief is presented in an action . . . or when multiple parties are involved, the court may enter a final judgment as to one or more but fewer than all of the claims or parties only if there is no just reason for delay and it is so determined in the judgment. Such judgment shall then be subject to review by appeal or as otherwise provided by these rules or other statutes. In the absence of entry of such a final judgment, any order or other form of decision, however designated, which adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties shall not terminate the action as to any of the claims or parties and . . . in the absence of entry of such a final judgment, any order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties.

(emphasis added). As a result, N. C. Gen. Stat. § 1A-1, Rule 54(b) directly states that when, as in this case, the trial court has not certified an order granting summary judgment with respect to fewer than all claims or all parties for immediate appellate review, the order in question does not “terminate the action as to any of the . . . parties.” Moreover, “ ‘in the absence of entry of such a final judgment, any order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties.’ ” *Bumpers v. Cmty. Bank of N. Va.*, 364 N.C. 195, 199, 695 S.E.2d 442, 445 (2010) (quoting Rule 54(b)). “Although the primary purpose of [N.C. Gen. Stat. § 1A-1, Rule 54(b)] is to preserve the right of a party to appeal from a final judgment, [N.C. Gen. Stat. § 1A-1,] Rule 54(b) unmistakably defines the effect of a nonfinal order on the status of parties in a multi-party case” and compels the conclusion “that [Mr. Alston and Ms. Kelly] remained [] parties to the case subsequent to the Court’s nonfinal [partial summary judgment] order.” *Dooley v. United Technologies Corp.*, 152

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F.R.D. 419, 424 (D.D.C. 1993). Thus, since Mr. Alston and Ms. Kelly “never requested the [trial] court to issue a final judgment as to [them],” “under the plain language of Rule 54(b), [they] remained [] part[ies] to the action,” *Knox v. Lederle Labs*, 4 F.3d 875, 878 (10th Cir. 1993)<sup>1</sup>, and remained liable for costs incurred throughout the pendency of this case.<sup>2</sup>

Although our dissenting colleague acknowledges that Mr. Alston and Ms. Kelly “technically remained parties to the lawsuit following the dismissal of 12 March 2009,” he concludes that, “[i]n the absence of evidence that Mr. Alston and Ms. Kelly actively participated in the litigation after 12 March 2009, they should not have been assessed with any of defendants’ costs incurred after that date.” Aside from the fact that the adoption of such a legal principle would be inconsistent with the literal language of N.C. Gen. Stat. § 1A-1, Rule 54, the use of such an approach would require implementation of a new and undefined standard requiring the trial and appellate courts to determine whether there is “evidence that [a party] actively participated in the litigation” after the dismissal of his claim in determining liability for costs. As a result, the difficulties inherent in the method of analysis that Plaintiffs appear to advocate and that our dissenting colleague supports provides additional justification for our decision to refrain from overturning the trial court’s decision to impose costs upon Mr. Alston and Ms. Kelly.

Our dissenting colleague also notes Defendants’ “suggest[ion of] four specific acts that Mr. Alston and Ms. Kelly could have performed so as to not incur liability for court costs after their claims were dismissed,” including taking a voluntary dismissal, with prejudice, after the entry of the order granting summary judgment in Defendants’ favor with respect to their negligent infliction of emotional distress claims or seeking to have the summary judgment order certified as final pursuant to N.C. Gen. Stat. § 1A-1, Rule 54(b). Although our col-

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1. As our dissenting colleague notes, the facts at issue in *Knox* are very different from those present here. However, we believe that the basic principle set out in *Knox* as described in the text of this opinion is directly relevant to the proper resolution of this case.

2. In their brief, Plaintiffs argue that neither Mr. Alston nor Ms. Kelly had any intention of appealing or seeking reconsideration of the order granting summary judgment in Defendants’ favor with respect to their negligent infliction of emotional distress claims and that this fact should suffice to render the summary judgment order final for cost-related purposes. We are unwilling to allow a party’s right to seek and obtain recovery of costs to hinge on the subjective intentions of the party being held liable for costs, particularly given the crystal clear language of N.C. Gen. Stat. § 1A-1, Rule 54(b).

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league characterizes the first of these two suggestions as “nonsensical,” the taking of such a dismissal with prejudice would have explicitly indicated that Mr. Alston and Ms. Kelly no longer had party status in this case. Similarly, although our dissenting colleague appears to assume that a certification of the order granting summary judgment in Defendants’ favor with respect to the negligent infliction of emotional distress claims asserted by Mr. Alston and Ms. Kelly would inevitably lead Plaintiffs to take a disfavored interlocutory appeal to this Court, nothing in N.C. Gen. Stat. § 1A-1, Rule 54(b) requires (as compared to allows) a party to take an interlocutory appeal from a certified order. As a result, we are not persuaded by our dissenting colleague’s rejection of certain of the suggestions advanced by Defendants concerning the steps that Mr. Alston and Ms. Kelly might have taken to avoid cost liability of the nature at issue here.

The trial court’s decision to allow the imposition of liability for costs upon parties against whom summary judgment was granted long before the entry of a judgment finally resolving all claims brought by all plaintiffs against all defendants may seem, at first glance, to be anomalous. However, given the literal language of N.C. Gen. Stat. § 1A-1, Rule 54(b), which explicitly provides that the entry of an interlocutory order like the one at issue here does “not terminate the action as to any of the claims or parties” involved, absent a certification of finality, and given the fact that the trial court retained the authority under N.C. Gen. Stat. § 1A-1, Rule 54(b) to revise, or even to reverse, such an interlocutory order until the entry of a final judgment, we are compelled to hold that the trial court did not commit an error of law by taxing costs incurred after the entry of an order granting summary judgment in Defendants’ favor with respect to the negligent infliction of emotional distress claims asserted against them by Mr. Alston and Ms. Kelly against all Plaintiffs.

**C. Public Policy Concerns**

[2] Secondly, Plaintiffs argue that a decision to affirm the trial court’s order would be contrary to the public policy of encouraging settlements, in that “settling parties or those otherwise dismissed from an action in the early stages of a case, would have no way of knowing until the final disposition of the case as to all parties whether or not they would be liable for costs incurred after their dismissal from the action.” Once again, we conclude that Plaintiffs’ argument is not persuasive.

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In seeking to convince us of the merits of this argument, Plaintiffs have not asserted that they entered into a settlement or that any rights that they might have had as “settling parties” have been violated. Instead, Plaintiffs appear to be urging us to consider the rights of a hypothetical set of parties who, after having settled, are taxed with costs incurred after the settlement of their claims. “As this Court has previously pointed out, it is not a proper function of courts ‘to give advisory opinions, or to answer moot questions[.]’ ” *Martin v. Piedmont Asphalt & Paving*, 337 N.C. 785, 788, 448 S.E.2d 380, 382 (quoting *Adams v. Dept. of N.E.R.*, 295 N.C. 683, 704, 249 S.E.2d 402, 414 (1978)) (internal citation omitted). Moreover, “it is the function of the General Assembly to establish the public policy of this State.” *Walter v. Vance County*, 90 N.C. App. 636, 641, 369 S.E.2d 631, 634 (1988) (citing *Martin v. Housing Corp.*, 277 N.C. 29, 175 S.E.2d 665 (1970)). In view of the fact that the General Assembly has, as we have noted above, adopted statutory language providing that persons in the position of Mr. Alston and Ms. Kelly remain parties to the underlying litigation until all claims have been finally resolved, we have no basis for concluding that the trial court’s order has any adverse public policy ramifications. Finally, despite Plaintiffs’ expression of concern that a party might remain liable for costs even after dismissing its claims, we note that Plaintiffs never dismissed their claims or took any other action that had the effect of rendering final the trial court’s order granting summary judgment in favor of Defendants with respect to the negligent infliction of emotional distress claims. As a result, given that Plaintiffs’ argument rests on facts that have no bearing on this case and would require us to ignore public policy decisions made by the General Assembly, we conclude that Plaintiffs are not entitled to relief on the basis of this argument.

D. Timeliness

**[3]** Thirdly, Plaintiffs argue that Defendants’ motion for costs was “untimely.” This argument lacks merit.

In seeking to persuade us to accept their timeliness argument, Plaintiffs assert that “[o]ur Courts have held that, if a Motion for Costs is not filed within a reasonable time after the ‘results were known’, it is untimely filed and will be time-barred.” As support for this contention, Plaintiffs cite *Okwara v. Dillard Dep’t Stores, Inc.*, 136 N.C. App. 587, 525 S.E.2d 481 (2000), in which this Court stated that:

Plaintiff first contends defendants’ claim for attorneys’ fees was time-barred. Citing F.R. Civ. P. 54(d)(2)(B)

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requiring motions for attorneys' fees to be filed within fourteen days following the entry of judgment, plaintiff argues we should apply a "rule of reasonableness" and find that it was violated by the "unreasonable and prejudicial" two year time period between the partial summary judgment order and the attorneys' fee motions. The fourteen day rule contained in F.R. Civ. P. 54(d)(2)(B) clearly does not apply to litigation pending in our State courts and the North Carolina Rules of Civil Procedure contain neither a counterpart to F.R. Civ. P. 54(d)(2)(B) nor a deadline for filing a motion for costs and fees. Rather, "the usual practice in awarding attorneys' fees is to make the award at the end of the litigation when all the work has been done and all the results are known." . . . [T]he litigation was ended on 8 July 1998 when plaintiff's petition for discretionary review was denied by the North Carolina Supreme Court. Dillard's amended motion for costs was filed 14 September 1998, and the Town's motion for costs was filed 10 August 1998, both within a reasonable time after the "results were known." We hold the motions for costs were not time-barred.

*Okwara*, 136 N.C. App at 592, 525 S.E.2d at 485 (quoting *Baxter v. Jones*, 283 N.C. 327, 331, 196 S.E.2d 193, 196 (1973)). Similarly, the present "litigation [] ended" when Plaintiff's opportunity to seek discretionary review of our decision in *Green II* expired on 20 December 2011. As a result of the fact that Defendants' supplemental motion for costs was filed on 3 January 2012 and the fact that the interval between the date upon which the litigation of this case ended and the filing of Defendants' supplemental motion was substantially shorter than the comparable period of time at issue in *Okwara*, we conclude that the trial court correctly declined to reject Defendants' efforts to have costs taxed against Plaintiffs on timeliness grounds.

**E. Taxation of Costs Against Ms. Crudup**

**[4]** Finally, Plaintiffs argue that, to the extent that the trial court taxed costs against Mr. Green's guardian *ad Litem*, it erred in doing so. As we read its order, however, the trial court determined that costs "are hereby taxed against Plaintiffs," a group which consists of Mr. Green, Ms. Kelly, and Mr. Alston. As Plaintiffs candidly concede, Defendants did not seek to have costs assessed against Ms. Crudup, and nothing in the trial court's order suggests that it did so. As a

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result, we conclude that the trial court did not tax costs against Ms. Crudup, making it unnecessary for us to consider Plaintiffs' contentions with respect to this issue.

**III. Conclusion**

Thus, for the reasons set forth above, we conclude that the trial court did not err by taxing costs against Mr. Alston and Ms. Kelly or by taxing costs against Ms. Crudup. As a result, the trial court's order should be, and hereby is, affirmed.

**AFFIRMED.**

Chief Judge MARTIN concurs.

Judge STEELMAN concurs in part and dissents in part by separate opinion.

STEELMAN, Judge, concurring in part and dissenting in part.

I concur with the majority opinion on the issues of the timeliness of defendant's motion seeking costs, and that the costs were taxed against Ms. Crudup only in her capacity as guardian *ad litem*. I must respectfully dissent as to the majority's holding that Mr. Alston and Ms. Kelly can be held liable for costs incurred after they were dismissed from the lawsuit.

As explained in the majority opinion, this case has a long and tortured procedural history going back to 2007, when the original complaint was filed. The current action, filed in 2008, contained multiple claims, by multiple plaintiffs, against multiple defendants, based upon multiple legal theories. These claims were resolved either by settlement or dismissal by the trial court over the next two years. On 12 March 2009, the claims of Mr. Alston and Ms. Kelly were dismissed by the trial court, with prejudice. These orders were not appealed by Mr. Alston and Ms. Kelly. The claims of the other plaintiffs were finally resolved by this court in *Green v. Kearney*, \_\_\_ N.C. App. \_\_\_, 719 S.E.2d 137 (2011). Neither Mr. Alston nor Ms. Kelly was a party to that appeal.

The issue presented is a narrow one: whether Mr. Alston and Ms. Kelly can be taxed with court costs incurred by defendants after their claims were dismissed, with prejudice, on 12 March 2009. The majority holds that since under the provisions of N.C.R. Civ. P. 54(b) Mr.

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Alston and Ms. Kelly remained parties to the action until all of the claims of all of the parties were resolved, they are liable for all costs incurred by the defendants.

In support of this proposition, the majority cites the case of *Knox v. Lederle Labs*, 4 F.3d 875, 878 (10th Cir. 1993). *Knox* was not a case dealing with the assessment of court costs, but rather was a *res judicata* case. Wyeth Labs moved for summary judgment in a prior action instituted by the plaintiff, and that motion was granted. Subsequently, plaintiffs dismissed their first action, without prejudice. A second action was later instituted. When plaintiffs rejoined Wyeth as a defendant in the second suit, Wyeth pled the prior summary judgment order in bar of plaintiffs' claims.

The Tenth Circuit Court of Appeals held that since at the time of entry of summary judgment in favor of Wyeth in the first suit, not all of the claims were resolved, Wyeth remained a party to the action. "Wyeth never requested the district court to issue a final judgment as to it. Therefore, under the plain language of Rule 54(b), Wyeth remained a party to the action when Plaintiffs sought to dismiss without prejudice." *Knox*, 4 F.3d at 878.

A federal statute permitted plaintiffs to withdraw their action for vaccine-related injury or death, and to file a petition under the National Childhood Vaccine Injury Compensation Act. 42 U.S.C. § 300aa-11. The Tenth Circuit held that since Wyeth remained a party to the action, the dismissal without prejudice controlled, and allowed them to be a party to the second action.

Explicit in the holdings of *Knox* and the majority opinion in the instant case is that it was incumbent upon Mr. Alston and Ms. Kelly to take some affirmative action following their dismissal from the lawsuit in order to stop the subsequent costs of defendants from being assessed against them. *Knox* states that this affirmative action would be to seek a "final judgment." I have reviewed the provisions of the North Carolina Rules of Civil Procedure, and can locate no provision where a plaintiff can request a "final judgment" where the trial court has already dismissed all of their claims, with prejudice.

In their brief, defendants suggest four specific acts that Mr. Alston and Ms. Kelly could have performed so as to not incur liability for court costs after their claims were dismissed: (1) do not file the lawsuit in the first place; (2) dismiss their lawsuit after discovery revealed the lack of merit of their claims; (3) voluntarily dismiss their claims after the trial court had dismissed them, with prejudice; or



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(4) seek a certification from the trial court under North Carolina Rule of Civil Procedure 54(b), and undertake an interlocutory appeal as to the dismissal of their claims. I do not find suggestions (1) and (2) to be helpful, since the issue only arises upon the dismissal of claims by the trial court. Suggestion (3) appears to be nonsensical. The dismissal of claims after they have already been dismissed, with prejudice, would be a fruitless act.

As to suggestion (4), this State has long had a policy of discouraging the piecemeal, interlocutory appeals.

General Statutes 1-277 and 7A-27 in effect provide “that no appeal lies to an appellate court from an interlocutory order or ruling of the trial judge unless such ruling or order deprives the appellant of a substantial right which he would lose if the ruling or order is not reviewed before final judgment.” *Consumers Power v. Power Co.*, 285 N.C. 434, 437, 206 S.E.2d 178, 181 (1974); accord, *Funderburk v. Justice*, 25 N.C. App. 655, 214 S.E.2d 310 (1975). An order is interlocutory “if it does not determine the issues but directs some further proceeding preliminary to final decree.” *Greene v. Laboratories, Inc.*, 254 N.C. 680, 693, 120 S.E.2d 82, 91 (1961). The reason for these rules is to prevent fragmentary, premature and unnecessary appeals by permitting the trial divisions to have done with a case fully and finally before it is presented to the appellate division. “Appellate procedure is designed to eliminate the unnecessary delay and expense of repeated fragmentary appeals, and to present the whole case for determination in a single appeal from the final judgment.” *Raleigh v. Edwards*, 234 N.C. 528, 529, 67 S.E.2d 669, 671 (1951).

*Waters v. Personnel, Inc.*, 294 N.C. 200, 207-08, 240 S.E.2d 338, 343 (1978) (footnotes omitted).

To require a losing party in a multiple-party, multiple-claim case to seek an interlocutory appeal in order to prevent it from being taxed with court costs incurred by the prevailing party subsequent to the dismissal flies in the face of the above-stated policy. It would in effect mandate that the risk of being taxed with future costs is a substantial right, meriting an interlocutory appeal under N.C. Gen. Stat. §§ 1-277 and 7A-27(d). I believe this to be contrary to the statutes and case law of North Carolina.

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I would hold that even though Mr. Alston and Ms. Kelly technically remained parties to the lawsuit following the dismissal of 12 March 2009, the dismissal became final when they elected not to appeal that ruling at the time that the other plaintiffs appealed the dismissal of their claims in January of 2011. In the absence of evidence that Mr. Alston and Ms. Kelly actively participated in the litigation after 12 March 2009, they should not have been assessed with any of defendants' costs incurred after that date.

The order of 12 March 2009, was an interlocutory order, and Mr. Alston and Ms. Kelly had the right to wait and see how the remainder of the claims were resolved before making a final decision on whether to appeal the dismissal. They should not be taxed with costs incurred after the dismissal in the absence of evidence showing that the subsequently incurred costs were attributable to their conduct.

I would hold that the trial court erred in assessing court costs against Mr. Alston and Ms. Kelly which accrued after the date of the dismissal with prejudice, 12 March 2009.

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HANDY SANITARY DISTRICT, PLAINTIFF

v.

BADIN SHORES RESORT OWNERS ASSOCIATION, INC., A/K/A BADIN SHORES  
RESORT HOMEOWNERS ASSOCIATION, DEFENDANT

No. COA12-873

Filed 5 February 2013

**1. Contracts—specific performance—condition precedent**

The trial court did not err by entering an order directing plaintiff to perform all of its obligations under a Wastewater Services Agreement and a subsequent consent order. The trial court did not err in concluding that Article II was not a condition precedent to performance because the plain language of the Agreement and the consent order required immediate performance, inconsistent with the existence of a condition precedent.

**2. Appeal and Error—preservation of issues—inclusion of transcript in record on appeal**

Plaintiff's argument that the trial court abused its discretion in denying its request to include the hearing transcript in the

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record on appeal was not properly before the Court of Appeals and was dismissed.

Appeal by plaintiff from orders entered 25 April 2012 and 12 July 2012 by Judge Steve A. Balog in Superior Court Montgomery County. Heard in the Court of Appeals 13 December 2012.

*Charles H. Harp II PC by Charles H. Harp II, for plaintiff-appellant.*

*Rossabi Black Slaughter, P.A. by Gavin J. Reardon, for defendant-appellees.*

STROUD, Judge.

Handy Sanitary District (“plaintiff”) appeals from an order entered 25 April 2012 directing it to perform all of its obligations under a Wastewater Services Agreement between plaintiff and Badin Shores Resort Homeowners Association (“defendant”) and a consent order entered by the trial court on 9 March 2011. Plaintiff also appeals from a 12 July 2012 order settling the record on appeal and omitting the hearing transcript from the record. For the following reasons, we affirm the trial court’s 25 April 2012 order and dismiss plaintiff’s appeal as to the 12 July 2012 order.

### I. Background and Procedural History

On or about 12 March 2009, plaintiff and defendant signed a Wastewater Services Agreement (“Agreement”) wherein plaintiff agreed to provide various wastewater services to defendant in exchange for a preset rate of pay per occupied lot. On 22 July 2010, plaintiff filed a complaint and petition for preliminary injunction in Superior Court, Montgomery County, alleging that defendant had refused plaintiff’s multiple attempts to provide the contracted-for services and requested that the court issue an injunction ordering defendant to allow plaintiff to provide wastewater services under the contract.

Defendant filed a motion to dismiss, answer, and counterclaim in response. Defendant raised multiple affirmative defenses, including that Article II of the Agreement contained an unfulfilled condition precedent, namely that the North Carolina Department of Environment and Natural Resources (“DENR”) had to issue a permit allowing operation of defendant’s sewer system prior to operation of the system. Defendant also counter-claimed for declaratory judgment, requesting that the court declare that no contract existed, or, in

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the alternative, that the above provision of the Agreement was a condition precedent to the operation of the contract.

On 9 March 2011, the Superior Court entered a consent order requiring defendant to permit plaintiff to enter its land and connect defendant's properties to plaintiff's sewer system, maintain the current system, and within thirty days of entry of the order defendant was required to provide plaintiff with a list of occupied lots to calculate the appropriate fee. The consent order "resolve[d] all pending claims between the parties with prejudice."

On 20 January 2012 defendant filed a motion to show cause, requesting that the court enter an order for plaintiff to appear and show cause why its failure to maintain defendant's wastewater system as agreed did not constitute contempt of the court's consent order. The Superior Court, Montgomery County, entered an order to show cause on 23 January 2012, to which plaintiff responded with a counter motion to show cause, alleging in part that because DENR has not yet issued a permit, it was not required to provide services to defendant. The court then held a hearing on the issues presented and, by order entered 25 April 2012, made findings of fact, concluded that Article II of the Agreement concerning the DENR permit was not a condition precedent, and ordered plaintiff and defendant to perform all of their contractual duties. Plaintiff filed written notice of appeal on 25 April 2012.

## II. Challenged Order

**[1]** Plaintiff argues that the trial court's findings of fact did not support its conclusions of law and that the trial court erred in concluding that Article II of the Agreement was not a condition precedent.

It is important to note at the outset that the initial agreement was modified and incorporated into the consent order. Thus, the contract in place at the time of the alleged breach by plaintiff was the Agreement as modified by the consent order.

The general rule is that a consent judgment is the contract of the parties entered upon the record with the sanction of the court. The consent judgment is a contractual agreement and its meaning is to be gathered from the terms used therein, and the judgment should not be extended beyond the clear import of such terms. However, to interpret the nature and import of the consent judgment more precisely, courts are not bound by

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the four corners of the instrument itself. The agreement, usually reflecting the intricate course of events surrounding the particular litigation, also should be interpreted in the light of the controversy and the purposes intended to be accomplished by it.

Where the plain language of a consent judgment is clear, the original intention of the parties is inferred from its words. The trial court's determination of original intent is a question of fact. On appeal, a trial court's findings of fact have the force of a jury verdict and are conclusive if supported by competent evidence. The trial court's determination of whether the language in a consent judgment is ambiguous, however, is a question of law and therefore our review of that determination is *de novo*.

*Hemric v. Groce*, 169 N.C. App. 69, 75-76, 609 S.E.2d 276, 281-82 (citations and quotation marks omitted), *disc. rev. denied*, 359 N.C. 631, 616 S.E.2d 234 (2005).

The trial court made the following relevant findings of fact and conclusions of law:

3. On or about March 9, 2011, the Parties entered into a Consent Order in which the contract executed the 12th day of March, 2009 (hereinafter "The Contract") by the Parties was incorporated into the Consent Order and all of the terms of the contract, were reaffirmed, except as expressly modified in the Consent Order.

4. The Contract entered into by the Parties states:

....

B. Article II. Connection/Activation Date. Handy shall provide full wastewater service to [Badin Shores] under this Agreement beginning no later than 90 days after the Badin Lake Area Sewer System is granted a full permit by the North Carolina Department of Environment and Natural Resources (DENR) and is fully operational.

....

E. Article IX (B). Handy will operate the existing collection system and will maintain, make repairs,

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and install replacements to that system as from time to time may be necessary. . . .

- (a) Handy will operate the [Badin Shores] Wastewater System until the connection is made to Handy's Wastewater Collection System. Handy will operate under the [Badin Shores] permit if permitted to do so by DENR.

. . . .

9. The Contract when taken as a whole and in connection with the Consent Order entered to [sic] and executed by the parties and filed with the Court of March 9, 2011 is clear and unambiguous as it relates to the requirements of Handy to assume the obligation of operating, maintaining, repairing, and when and if necessary, replacing the existing Waste Water Collection System within [Badin Shores].

10. The Court after reviewing pages from the Fifth Edition of Black's Law Dictionary for the words assume, maintain, maintenance, obligate, obligation, operate, repair, and replace find those words to be clear and unambiguous and that the Contract requires that Handy perform those services pursuant to the terms of the Contract and the Consent Order for the benefit of [Badin Shores] which services are to include all costs for electricity needed to operate, maintain, and or [sic] replace the [Badin Shores] collection system . . . .

CONCLUSIONS OF LAW

. . . .

3. The Waste Water Services Agreement entered into between the Parties on or about March 12, 2009 and the Consent Order entered by the Court on or about March 9, 2011 are clear and unambiguous and Handy is required to perform it's [sic] obligations as set forth in the Waste Water Services Agreement and Consent Order without further delay. . . .

4. Paragraph II CONNECTION/ACTIVATION DATE of the Wastewater Services Agreement as set forth herein-above is not a condition precedent and the Badin Lake

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Area Sewer System does not need to be fully operational and the Plaintiff does not need to be granted a full permit by the North Carolina Department of Environment and Natural Resources before the contractual right arises for Plaintiff to provide full wastewater service to Defendant.

Plaintiff does not challenge any finding of fact as unsupported by the evidence. The contents of the initial agreement and the consent order are undisputed. Plaintiff correctly notes that the court's findings 9 and 10 concerning the lack of ambiguity in the contract are actually conclusions of law reviewed *de novo*. See *Myers v. Myers*, \_\_\_ N.C. App. \_\_\_, \_\_\_, 714 S.E.2d 194, 198 (2011) ("Our review of a trial court's determination of whether a contract is ambiguous is *de novo*."). Plaintiff does not, however, argue that either the Agreement or the consent order is ambiguous. Indeed, it argues that the plain language of the Agreement "clearly indicates" a condition precedent. Thus, the only question is whether the trial court erred in concluding that Article II was not a condition precedent.

Defendant argues that plaintiff is bound by its contrary prior judicial admission and ought to be judicially estopped from making this argument on appeal because its original complaint requested specific performance, which necessarily assumes no unfulfilled conditions precedent. See *In re Foreclosure of Goforth Properties, Inc.*, 334 N.C. 369, 375-76, 432 S.E.2d 855, 859 (1993) ("non-occurrence of a condition prevents the promisee from acquiring a right, or deprives him of one." (citation and quotation marks omitted)). Although plaintiff's position before the trial court in the contempt hearing and on appeal is the exact opposite of its position in the complaint, defendant apparently raised neither estoppel nor judicial admissions below, as the trial court made no mention of either in its order.

A condition precedent is an event which must occur before a contractual right arises, such as the right to immediate performance. Breach or non-occurrence of a condition prevents the promisee from acquiring a right, or deprives him of one, but subjects him to no liability. The provisions of a contract will not be construed as conditions precedent in the absence of language plainly requiring such construction. The weight of authority is to the effect that the use of such words as 'when,' 'after,' 'as soon as,' and the like, gives clear indication that a

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promise is not to be performed except upon the happening of a stated event.

*Id.* at 375-76 (citations, quotation marks, and brackets omitted).

The relevant language from the Agreement states that “Handy shall provide full wastewater service to BSR under this Agreement beginning no later than 90 days after the Badin Lake Area Sewer System is granted a full permit by the North Carolina Department of Environment and Natural Resources (DENR) and is fully operational.” As plaintiff argues, this language contains the word “after”, a word that may indicate a condition precedent. *See id.* at 376. The Agreement also makes clear, however, that the parties’ duty to perform was to begin before DENR granted the permit by stating in Article 9(B)(a) that “Handy will operate the BSR Wastewater System until the connection is made to Handy’s Wastewater Collection System. Handy will operate under the BSR permit if permitted to do so by DENR.” There is no evidence that DENR has forbidden plaintiff from operating under defendant’s license, as contemplated by the Agreement, or otherwise attempted to prevent plaintiff’s performance.<sup>1</sup>

Moreover, the consent order called for *immediate* performance by both parties, as requested by plaintiff in its initial complaint, and in no way implied that performance by either party was to be delayed until DENR issued a permit. “The [consent order], usually reflecting the intricate course of events surrounding the particular litigation, also should be interpreted in the light of the controversy and the purposes intended to be accomplished by it.” *Hemric*, 169 N.C. App. at 75, 609 S.E.2d at 82. In plaintiff’s complaint, it requested immediate access to defendant’s lots in order to begin performance. Defendant raised several affirmative defenses, including that Article II was a condition precedent to performance. If defendant had been correct that it was a condition precedent, plaintiff would not have been entitled to specific performance as it had requested. *See In re Foreclosure of Goforth Properties, Inc.*, 334 N.C. at 375, 432 S.E.2d at 859. Thus, the issue of whether Article II was a condition precedent was a central part of the controversy. The consent order “resolve[d] all pending claims between the parties,” including defendant’s claim

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1. Plaintiff further argues that Article II had to be a condition precedent because it would be precluded from operating the wastewater system without a license under N.C. Gen. Stat. § 143-215.1(a)(2011). Given Article 9(B)(a) of the Agreement, which provides for operating under defendant’s license, and the absence of evidence that DENR or any other governmental entity has even threatened to forbid such operation, we find this argument unpersuasive.



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that Article II was a condition precedent. By requiring immediate performance of the contractual duties by both parties, the consent order necessarily disposed of any potential condition precedent. *See id.* (“A condition precedent is an event which must occur *before* a contractual right arises, *such as the right to immediate performance.*” (emphasis added)).

Plaintiff also argues that the sequence of the articles in the contract gives prior articles, such as Article II, superior force over the subsequent articles, such as Article IX, which require immediate performance, based simply on the location of the provision in the contract. This argument is creative but without any discernible basis in the rules of contract interpretation or law. Contracts are to be considered in their entirety and the various provisions are to be interpreted harmoniously when possible. *See Meehan v. American Media Intern., LLC*, \_\_\_ N.C. App. \_\_\_, \_\_\_, 712 S.E.2d 904, 911 (2011) (“A contract must be considered as an entirety. The problem is not what the separate parts mean, but what the contract means when considered as a whole.” (citation, quotation marks and brackets omitted)), *disc. rev. denied*, \_\_\_ N.C. \_\_\_, 731 S.E.2d 151 (2012); *Jeffers v. D’Alessandro*, 199 N.C. App. 86, 100, 681 S.E.2d 405, 415 (2009) (“In interpreting contracts, the various terms of the contract are to be harmoniously construed, and if possible, every word and every provision is to be given effect.” (citation, quotation marks, and ellipses omitted)). One provision cannot be given precedence over another simply by virtue of the order in which they appear in the contract. Plaintiff cites no case that supports its proposition that the order of the provisions of the contract indicates the “priority of the order in which they should be read.” This argument is without merit.

“[C]onditions precedent are disfavored by the law. Only where the clear and plain language of the agreement dictates such construction will a term be viewed as a condition precedent to performance of a contractual obligation.” *Stewart v. Maranville*, 58 N.C. App. 205, 206, 292 S.E.2d 781, 782 (1982) (citation omitted). Because the plain language of the Agreement and the consent order required immediate performance, inconsistent with the existence of a condition precedent, we hold that the trial court did not err in concluding that Article II was not a condition precedent to performance.

### III. Omission of the Hearing Transcript on Appeal

**[2]** Plaintiff also contends that the trial court abused its discretion in denying its request to include the hearing transcript in the record on

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appeal. We conclude that this issue is not properly before us and dismiss plaintiff's appeal as to this issue.

[O]nly the judge of the superior court or of the district court from whose order or judgment an appeal has been taken is empowered to settle the record on appeal when judicial settlement is required. N.C. Gen.Stat. § 1-283 (1999). This Court has held that the appellate court is bound by the contents of the record on appeal. The record imports verity and the Court of Appeals is bound thereby. Where asked to settle the record on appeal, the trial judge then has both the power and the duty to exercise supervision to see that the record accurately presents the questions on which this Court is expected to rule. This Court must receive and act upon the case settled for this Court as importing absolute verity and as it comes from the court below. This Court has no authority to suggest to, direct or require the judge, in settling the case, as to what facts he shall state, or what matter he shall set forth. Thus, the trial judge's settlement of the record on appeal is final, and cannot be reviewed by this Court on appeal.

*North Carolina Farm Bureau Mut. Ins. Co. v. Allen*, 146 N.C. App. 539, 543-44, 553 S.E.2d 420, 423 (2001) (citations, quotation marks, ellipses, and brackets omitted).

Plaintiff has not filed a petition for certiorari regarding settlement of the record. Nor has plaintiff included in the record before this Court a supplement including the disputed transcript pursuant to Rule 11(c) of the North Carolina Rules of Appellate Procedure. N.C.R. App. P. 11(c) ("If a party requests that an item be included in the record on appeal but not all other parties to the appeal agree to its inclusion, then that item shall not be included in the printed record on appeal, but shall be filed by the appellant with the printed record on appeal in three copies of a volume captioned 'Rule 11(c) Supplement to the Printed Record on Appeal,' along with any verbatim transcripts, narrations of proceedings, documentary exhibits, and other items that are filed pursuant to Rule 9(c) or 9(d); provided that any item not filed, served, submitted for consideration, or admitted, or for which no offer of proof was tendered, shall not be included. Subject to the additional requirements of Rule 28(d), items in the Rule 11(c) supplement may be cited and used by the parties as

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would items in the printed record on appeal.”) We are without power to review the trial court’s settlement of the record on direct appeal and therefore dismiss plaintiff’s appeal as to the 12 July 2012 order. *See Craver v. Craver*, 298 N.C. 231, 237, 258 S.E.2d 357, 362 n.6 (1979) (“Generally the action of the trial judge in settling the record on appeal when the parties cannot agree thereon is final and not subject to direct appeal. However, a challenge to the trial court’s settlement may be preserved by an application for certiorari *made incidentally* with the perfection of the appeal upon what record there is.” (emphasis in original)). Given the absence of a Rule 11(c) supplement, we also decline to treat the plaintiff’s brief as a petition for certiorari, as it would be impossible for us to consider plaintiff’s arguments without having the disputed transcript before us.<sup>2</sup>

## IV. Conclusion

In summary, we affirm the trial court’s 25 April 2012 order because the court did not err in concluding that Article II of the Agreement was not a condition precedent and dismiss plaintiff’s appeal as to the 12 July 2012 order regarding settlement of the record on appeal.

**AFFIRMED; DISMISSED.**

Judges McGEE and HUNTER, JR., Robert N. concur.

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2. In addition, plaintiff’s brief does not provide any indication that the transcript would be relevant to the issues before this Court, as plaintiff argues generally that “A transcript would provide insight into several matters including evidence received, if any; arguments of counsel; review of exhibits; review of case law; and inquiry by the trial court. In this matter it would be particularly relevant as Findings of Fact Nos. 6 and 7 reference arguments of counsel and Finding of Fact No. 8 references stipulations of counsel.” But as noted above, plaintiff has not challenged findings of fact 6, 7, or 8 on appeal.

**HOUSECALLS HOME HEALTH CARE, INC. v. STATE**

[225 N.C. App. 306 (2013)]

HOUSECALLS HOME HEALTH CARE, INC., HOUSECALLS HEALTHCARE GROUP,  
INC., AND TERRY WARD, INDIVIDUALLY, PLAINTIFFS

v.

STATE OF NORTH CAROLINA, DEPARTMENT OF HEALTH AND HUMAN  
SERVICES, AND LANIER M. CAMSLER,<sup>1</sup> INDIVIDUALLY AND AS SECRETARY, DEFENDANTS

NO. COA12-839

Filed 5 February 2013

**1. Appeal and Error—interlocutory orders—substantial right—risk of inconsistent verdicts**

The Court of Appeals elected to address defendants' appeal from an interlocutory order in a Medicaid fraud investigation case so that this protracted action could move toward a final resolution despite defendants' failure to explain the risk of inconsistent verdicts in its statement of grounds for appellate review since such a risk was plainly presented in this case.

**2. Collateral Estoppel and Res Judicata—res judicata—due process requirements—Medicaid fraud investigation**

The trial court committed reversible error in a Medicaid fraud investigation case by denying defendants' motion for summary judgment with respect to the legal theory of *res judicata* based on outcomes in the previous litigation between the parties in the federal district and state superior courts. Plaintiffs' desire to be heard in keeping with due process requirements was a material and relevant matter within the scope of the pleadings which in the exercise of reasonable diligence could and should have been brought forward in the prior litigation.

Appeal by Defendants from order entered 5 April 2011 by Judge Abraham Penn Jones in Wake County Superior Court. Heard in the Court of Appeals 12 December 2012.

*Thomas B. Kobrin for Plaintiffs.*

*Attorney General Roy Cooper, by Assistant Attorney General Richard J. Votta, for Defendants.*

STEPHENS, Judge.

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1. Per this Court's custom, the parties are listed in the caption of this opinion as they appear in the order from which this appeal was taken. We take judicial notice that Defendant Cansler left his position as Secretary of DHHS in February 2012, after entry of

**HOUSECALLS HOME HEALTH CARE, INC. v. STATE**

[225 N.C. App. 306 (2013)]

*Procedural History and Factual Background*

This case arises from a Medicaid fraud investigation of Plaintiffs Housecalls Home Health Care, Inc., Housecalls Healthcare Group, Inc., and Terry Ward (collectively, “Housecalls”) by Defendant North Carolina Department of Health and Human Services (“DHHS”). Housecalls Home Health Care, Inc. and Housecalls Healthcare Group, Inc., are North Carolina corporations which received a Certificate of Need from DHHS in 1985 to provide home healthcare services to Medicaid patients in North Carolina. Ward owns a 100 percent interest in the common stock of each corporation.

There has been an administrative hearing and at least two prior civil actions between these parties and, because they bear directly on our resolution of the appeal in this matter, we include the procedural history of those matters in an attempt to bring clarity to this saga.<sup>2</sup> While the procedural history of the dispute between these parties has been long and complex, our resolution of the appeal here is straightforward and brief.

*The 1997 Investigation and Resulting Administrative Hearing*

In early 1997, DHHS attempted to revoke the license and certification of Housecalls Home Health Care, but that corporation passed the review procedures and maintained its license and certification. In April 1997, on or about the same day that Housecalls Home Health Care passed its review, DHHS informed Housecalls that Medicaid reimbursements would be temporarily withheld due to reliable evidence of fraud, an action authorized by 42 C.F.R. § 455.23(a) (2010).<sup>3</sup> In addition, the Medicaid Investigation Unit (“MIU”) of the North Carolina Attorney General’s Office seized virtually all of Housecalls’ equipment and medical records. In response, Housecalls filed an

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the order appealed from here. Housecalls subsequently replaced “LANIER M. CANSLER, Individually and as Secretary” with “ALBERT DELIA, Acting Secretary, in his Official Capacity” in the caption of its brief to this Court and the record on appeal.

2. We note that the composition of the record on appeal in this case can be fairly described as haphazard and left much to be desired as a helpful guide to this Court.

3. Section 455.23 provides: “Withholding of payments in cases of fraud or willful misrepresentation. (a) Basis for withholding. The State Medicaid agency may withhold Medicaid payments, in whole or in part, to a provider upon receipt of reliable evidence that the circumstances giving rise to the need for a withholding of payments involve fraud or willful misrepresentation under the Medicaid program. The State Medicaid agency may withhold payments without first notifying the provider of its intention to withhold such payments. A provider may request, and must be granted, administrative review where State law so requires.” 42 C.F.R. § 455.23.

## HOUSECALLS HOME HEALTH CARE, INC. v. STATE

[225 N.C. App. 306 (2013)]

action in the Office of Administrative Hearings (“OAH”) which was eventually dismissed in July 1998 for failure to prosecute and because Housecalls had failed to exhaust its administrative remedies.<sup>4</sup>

From the record on appeal, it appears that neither DHHS, the MIU, nor any other state or federal government entity ever brought administrative, civil, or criminal charges against Housecalls for the alleged Medicaid fraud which led to the reimbursement withholding or property seizure. However, it also appears that the withheld reimbursements and seized property were never released or returned to Housecalls. As a result, Housecalls went out of business. The record suggests that Housecalls had no contact with Defendants for the next five and one-half years.

In January 2004, Housecalls sent a letter to the MIU seeking information about the status of the DHHS investigation, the withheld reimbursements, and the seized property. Defendants assert that, in a February 2004 response by letter, the MIU stated that the investigation had been closed and the withheld funds disbursed to federal, state, and county governments in partial recoupment of the overpayments found as a result of the investigation. However, Housecalls denies ever having received such a letter. In any event, Housecalls took no further action regarding the withheld funds or property for some two and one-half years.

The Federal District Court Case

In August 2006, Housecalls filed a civil action in the United States District Court for the Middle District of North Carolina against Defendants<sup>5</sup> seeking: (1) a declaration that reimbursement funds cannot be withheld in the absence of an active fraud investigation, (2) monetary damages for breach of contract, (3) compensation for denial of due process under the United States and North Carolina constitutions and under 42 U.S.C. § 1983, and (4) an injunction requiring Defendants to release all reimbursement funds withheld and property seized. On 5 April 2007, Federal Magistrate Russell A. Eliason issued an opinion, which the federal district court adopted by order filed 23 July 2007. *See Housecalls Home Healthcare, Inc. v.*

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4. No pleadings or other materials from the OAH proceedings appear in the record before us, but the hearing and its outcome are referred to in documents filed or produced in the later court actions, as well as in the 2009 opinion from this Court, *infra*.

5. That action also named additional State and Federal defendants not parties to this case, including the United States Department of Health and Human Services, the North Carolina Department of State Treasurer, and individuals connected to those agencies.

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*United States HHS*, 515 F. Supp. 2d 616 (M.D.N.C. 2007). Relevant to this appeal, as to Housecalls' claims seeking release of withheld funds, the federal court held this relief would constitute monetary damages, a remedy not permitted against governmental entities or officers under section 1983. *Id.* at 628-30. Accordingly, these claims were dismissed. *Id.* at 618.<sup>6</sup>

*The First State Court Case*

On 28 September 2007, Housecalls filed a civil action against Defendants in the superior court of Guilford County (file no. 2007 CVS 10646) alleging (1) breach of contract, (2) violation of the constitutions of the United States and of North Carolina, (3) entitlement to legal and injunctive relief pursuant to section 1983, (4) conversion, and (5) unjust enrichment. All of the relief sought by Housecalls was monetary, with the sole exception of a request for release of its seized property.<sup>7</sup> No pre-appeal documents in that matter beyond Housecalls' complaint appear in the record before us, but the opinion later issued by this Court on appeal in that matter, *Housecalls Home Health Care, Inc. v. State of North Carolina*, 200 N.C. App. 66, 682 S.E.2d 741 (2009), *disc. review denied*, 363 N.C. 802, 690 S.E.2d 697 (2010), provides the following details: Defendants moved for summary judgment asserting, *inter alia*, statutes of limitation. *Id.* at 69, 682 S.E.2d at 743. In support of this motion, Defendants alleged their February 2004 response by letter to Housecalls' inquiry about the status of the Medicaid fraud investigation. *Id.* On 30 June 2008, the trial court held that Housecalls' claims were barred by applicable statutes of limitation and granted Defendants' motion for summary judgment. *Id.* at 69, 682 S.E.2d at 743-44. Housecalls appealed. *Id.* at 69, 682 S.E.2d at 744.

On appeal, this Court affirmed summary judgment for Defendants as to Housecalls' state tort and contract claims. *Id.* at 71, 682 S.E.2d at 745. However, we reversed and remanded as to Housecalls' section 1983 claims:

As previously discussed, [Housecalls] filed their claim more than three years after the February 2004 communi-

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6. As for Housecalls' additional section 1983 claims, the federal court held that the claims seeking (1) a declaration that there existed no ongoing investigation of Housecalls and (2) return of seized property *could* go forward in federal court. *Id.* However, the record on appeal does not include any indication of whether those claims ever went to trial.

7. At some point the case apparently was moved to the superior court in Wake County under the file no. 08 CVS 3853, but no explanatory documents appear in the record.

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cation. However, [House- calls] filed an affidavit stating in essence that they did not receive a letter regarding the status of the investigation and the funds. On these facts, we hold there exists a genuine issue of material fact as to when [Housecalls] knew or reasonably should have known that the investigation was closed. Therefore, because factual questions exist as to when [Housecalls'] § 1983 cause of action accrued, we reverse the trial court's order of summary judgment as relates to the § 1983 claim.

*Id.* at 72, 682 S.E.2d at 745-46.

On remand, Defendants filed a notice of hearing on 10 March 2010 on motions to dismiss Housecalls' section 1983 claims under Rule of Civil Procedure 12(b)(1), (2), and (6) based on three grounds: (1) as to claims against DHHS and its secretary in his official capacity, Defendants asserted sovereign immunity; (2) as to claims against the Secretary in his individual capacity, Defendants asserted sovereign and qualified immunity; and (3) as to DHHS and the Secretary in his individual and official capacities, Defendants asserted that the allegations in Housecalls' complaint were solely conclusory in nature. The notice of hearing also references a motion for summary judgment on Housecalls' section 1983 claims based on two grounds: (1) as to claims seeking damages or return of withheld funds, Defendants asserted *res judicata* and collateral estoppel and (2) as to claims seeking return of seized property, Defendants asserted mootness, claiming that all seized property had already been returned. Following a hearing on Defendants' motions, the trial court entered an order on 18 May 2010 which granted Defendants' motions to dismiss except as to Housecalls' claim requesting the return of any physical property and equipment allegedly retained by Defendants. On 17 December 2010, Housecalls filed a notice of voluntary dismissal without prejudice as to this remaining claim. In sum, in the first state court case, Housecalls again sought monetary damages and/or the return of withheld funds and those claims were resolved against Housecalls.

*The Second State Court Case*

The matter under review in this appeal originated with Housecalls' 7 September 2010 filing of an action in the superior court in Guilford County (file no. 2010 CVS 9734) seeking an injunction to compel Defendants to (1) show whether the Medicaid fraud investigation of Housecalls is ongoing or has ended; (2) hold a hearing to



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determine whether Defendants owe any monies to Housecalls or whether Housecalls owes any monies to Defendants; (3) determine the amount of any money owed to Housecalls by Defendants; (4) determine the amount of any money owed to Defendants by Housecalls; (5) release to Housecalls any monies owed; and (6) provide Housecalls due process, including the right to be heard. On 9 November 2010, Defendants filed an answer, including various affirmative defenses, counterclaims, and motions for change of venue<sup>8</sup> and dismissal. On 10 January 2011, Housecalls filed a reply and also moved to dismiss Defendants' counterclaims. On 28 February 2011, Defendants filed motions for a protective order and a qualified protective order. On 21 March 2011, Housecalls moved to compel full responses to its first set of discovery.

The motions came on for hearing at the 16 May 2011 session of superior court in Wake County. By order entered 5 April 2012, the trial court (1) granted Housecalls' motion to compel; (2) denied Defendants' motions for summary judgment based on the statute of limitations, *res judicata*, and collateral estoppel; (3) granted a motion to dismiss as to the Defendant Secretary of DHHS in his individual capacity; (4) denied Defendants' motions to dismiss based, *inter alia*, upon sovereign immunity; (5) granted Defendants' motion for a qualified protective order regarding materials covered by the Health Insurance Portability and Accountability Act ("HIPPA") and related state statutes;<sup>9</sup> (6) denied Defendants' other motions for protective orders; and (7) denied all motions for sanctions and costs. From that order, Defendants bring this interlocutory appeal.

*Discussion*

On appeal, Defendants argue that the trial court erred in (1) denying Defendant's motion for summary judgment based on *res judicata* and collateral estoppel, (2) denying Defendants' motions to dismiss based on sovereign immunity defenses, and (3) denying Defendants' motion for protective order regarding the disclosure and use of cer-

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8. Although no explanatory filings appear in the record before this Court, Plaintiff's First Set of Discovery, served by mail on 3 December 2010, is the last document in the record filed in the superior court in Guilford County and bearing the file number 2010 CVS 9734. Beginning with Defendants' "Responses to Plaintiffs[]" First Set of Discovery," dated 25 February 2011, all filings are in the superior court in Wake County and bear the file number 11 CVS 2696. This Court is left to assume that Defendants' motion for change of venue was allowed.

9. The qualified HIPPA protective order was entered separately by the trial court on 10 April 2012.

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tain criminal investigation records subject to statutory protections. Because we conclude that the relief sought by Housecalls in this case is barred by *res judicata*, we reverse and remand to the trial court for dismissal of all claims.

*Grounds for Appellate Review*

[1] Defendants' statement of the grounds for appellate review acknowledges that this appeal is interlocutory, but asserts that each of the rulings from which they purport to appeal affect a substantial right and are thus subject to immediate review. While Defendants cite authorities for this assertion, they offer no analysis or argument. Relevant to the basis on which we decide the issues raised in this appeal, "the denial of a motion for summary judgment based upon the defense of *res judicata* may involve a substantial right so as to permit immediate appeal *only where a possibility of inconsistent verdicts exists if the case proceeds to trial.*" *Heritage Operating, L.P. v. N.C. Propane Exch., LLC*, \_\_ N.C. App. \_\_, \_\_, 727 S.E.2d 311, 314 (2012) (citations and quotation marks omitted) (emphasis added).

To demonstrate that a second trial will affect a substantial right, [the appellant] must show not only that one claim has been finally determined and others remain which have not yet been determined, but that (1) the same factual issues would be present in both trials *and* (2) the possibility of inconsistent verdicts on those issues exists[.]

*Id.* at \_\_, 727 S.E.2d at 314-15 (citations and quotation marks omitted) (emphasis in original).

We are mindful that

[i]t is not the duty of this Court to construct arguments for or find support for [an] appellant's right to appeal from an interlocutory order; instead, the appellant has the burden of showing this Court that the order deprives the appellant of a substantial right which would be jeopardized absent a review prior to a final determination on the merits.

*Jeffreys v. Raleigh Oaks Joint Venture*, 115 N.C. App. 377, 380, 444 S.E.2d 252, 254 (1994) (citation omitted). However, despite Defendants' failure to explain the risk of inconsistent verdicts in its statement of grounds for appellate review, such a risk is plainly presented

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in this case. Accordingly, we elect to address Defendants' appeal so that this protracted action may move toward a final resolution.

*Res Judicata*

[2] Defendants first argue the trial court committed reversible error in denying their motion for summary judgment with respect to the legal theory of *res judicata* based on outcomes in the previous litigation between the parties in the federal district and state superior courts. We agree.

Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." N.C. Gen. Stat. § 1A-1, Rule 56(c) (2011). On appeal, "[t]he standard of review for summary judgment is *de novo*." *Forbis v. Neal*, 361 N.C. 519, 524, 649 S.E.2d 382, 385 (2007). Further, whether the doctrine of *res judicata* operates to bar a cause of action is a question of law reviewed *de novo* on appeal. *Bluebird Corp. v. Aubin*, 188 N.C. App. 671, 679, 657 S.E.2d 55, 62, *disc. review denied*, 362 N.C. 679, 669 S.E.2d 741 (2008).

Under the doctrine of *res judicata* or claim preclusion, a final judgment on the merits in one action precludes a second suit based on the same cause of action between the same parties or their privies. The doctrine prevents the relitigation of all matters . . . that were or should have been adjudicated in the prior action.

*Whitacre P'ship v. Biosignia, Inc.*, 358 N.C. 1, 15, 591 S.E.2d 870, 880 (2004) (citations and quotation marks omitted). Thus,

*[r]es judicata* not only bars the relitigation of matters determined in the prior proceeding but also all material and relevant matters within the scope of the pleadings, which the parties, in the exercise of reasonable diligence could and should have brought forward. All of a party's damages resulting from a single wrong must be recovered in a single action. The purpose of the doctrine of *res judicata* is to protect litigants from the burden of relitigating previously decided matters and to promote judicial economy by preventing unnecessary litigation.

*Holly Farm Foods v. Kuykendall*, 114 N.C. App. 412, 416-17, 442 S.E.2d 94, 97 (1994) (citations and quotation marks omitted).

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As discussed *supra*, the federal and first state court cases have already determined that Housecalls cannot recover the withheld funds or monetary damages from Defendants. Accordingly, Housecalls' second, third, fourth, and fifth requests for injunctive relief, all of which seek determination of monies allegedly owed by one party to the other and the release of any such funds, are plainly barred by *res judicata*. See *Whitacre P'ship*, 358 N.C. at 15, 591 S.E.2d at 880 (holding that "a final judgment on the merits in one action precludes a second suit based on the same cause of action between the same parties or their privies").

Housecalls acknowledges that the claims in this case are based upon the same series of transactions as the previously litigated claims. However, they contend their claims here are not barred because previously Housecalls sought release of withheld funds based on the alleged wrongful withholding thereof, while they now seek a hearing (requests for injunctive relief 1 and 6) based on the alleged wrongful violation of their due process rights. We are not persuaded. The essence of all of Housecalls' claims against Defendants is the same: that Defendants wrongfully withheld funds from Housecalls and Housecalls wants the funds back. Indeed, at oral argument, Housecalls' counsel candidly admitted that Housecalls seeks a due process hearing in hopes that it would be a "back door" to eventually obtaining the withheld funds. We conclude that Housecalls' desire to be heard in keeping with due process requirements is a "material and relevant matter[]" within the scope of the pleadings, which [Housecalls], in the exercise of reasonable diligence could and should have brought forward" in the prior litigation. *Holly Farm Foods*, 114 N.C. App. at 416, 442 S.E.2d at 97. Accordingly, we reverse the trial court's order and remand for dismissal of all claims. In light of our resolution of this issue, it is unnecessary to address Defendants' remaining issues on appeal.

REVERSED AND REMANDED.

Judges STEELMAN and McCULLOUGH concur.

## IN RE A.N.C.

[225 N.C. App. 315 (2013)]

IN THE MATTER OF A.N.C., JR.

No. COA12-482

Filed 5 February 2013

**1. Appeal and Error—preservation of issues—no objection at trial—custodial interrogation of juvenile—plain error review**

A juvenile's challenges to the admission of his statement to an officer were reviewed with a plain error standard where the juvenile did not assert his challenge in the court below. The North Carolina Supreme Court has flatly held that challenges to the admissibility of evidence based upon N.C.G.S. § 7B-2101 must be raised by means of a motion to suppress in order to preserve any challenge to the admission of such evidence for appellate review.

**2. Confessions and Incriminating Statements—juvenile—custodial interrogation**

An officer did not subject a juvenile to custodial interrogation during the course of a roadside investigation into the accident in which the juvenile was involved and the officer's testimony that the juvenile acknowledged having driven the vehicle involved in the accident was not admitted in violation of N.C.G.S. § 7B-2101 or *Miranda*. The requirement that an individual involved in a motor vehicle accident remain on the scene does not equate to a restraint on that individual's freedom equivalent to "a formal arrest" and the juvenile did not establish that the officer's inquiry subjected him to even a minimal restraint on his freedom of movement or his ability to act as he chose.

**3. Confessions and Incriminating Statements—juvenile—statements following car wreck**

The voluntariness challenge to the admission of a juvenile's statement to an officer lacked merit where the thirteen-year old was charged with offenses arising from having driven and wrecked a car and argued that the necessity created by N.C.G.S. § 20-166(c1) for him to respond to an officer's questions meant that his admission that he was the driver of the wrecked vehicle was made in violation of his constitutional right against compulsory self-incrimination. The mere requirement that an individual disclose his name to an investigating officer on the scene of a motor vehicle accident does not necessarily have incriminating effect and the record contains no additional information suggest-

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ing that his statement resulted from any coercive conduct on the part of the officer.

**4. Juveniles—delinquency—reckless driving**

The trial court erred by denying a juvenile's motion to dismiss the petition alleging that he be adjudicated delinquent for reckless driving. The mere fact that an unlicensed driver ran off the road and collided with a utility pole did not suffice to establish a violation of N.C.G.S. § 20-140(b).

**5. Juveniles—delinquency—unauthorized use of motor vehicle**

The trial court erred by denying a juvenile's motion to dismiss a petition that he be adjudicated delinquent for committing the offense of unauthorized use of a motor vehicle. The mere fact that an underaged, unlicensed individual operated a motor vehicle registered to another person did not, without more, suffice to establish the required lack of consent.

**6. Evidence—juvenile's admission—corpus delicti rule**

Although a juvenile contended that the record did not contain sufficient evidence to support a determination that he operated a motor vehicle without being properly licensed on the basis of the *corpus delicti* rule, the record contained ample additional evidence tending to establish the trustworthiness of the juvenile's admission, thereby adequately supporting the trial court's denial of the juvenile's motion to dismiss.

Appeal by juvenile from adjudication and disposition orders entered 16 December 2011 by Judge Denise S. Hartsfield in Forsyth County District Court. Heard in the Court of Appeals 27 September 2012.

*Attorney General Roy Cooper, by Assistant Attorney General Eryn E. Linkous, for the State.*

*Mark L. Hayes for Juvenile-Appellant.*

ERVIN, Judge.

Juvenile A.N.C., Jr.,<sup>1</sup> appeals from orders placing him on juvenile probation subject to certain specified terms and conditions based upon determinations that he had engaged in the unauthorized use of

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1. A.N.C., Jr., will be referred to throughout the remainder of this opinion as "Andrew," a pseudonym used for ease of reading and to protect the juvenile's privacy.

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a motor vehicle, operated a motor vehicle without being properly licensed to do so, and operated a motor vehicle in a reckless manner. On appeal, Andrew contends that the trial court committed plain error by admitting into evidence a statement that he had made to the investigating officer and by denying his motion to dismiss the juvenile petitions that had been issued against him for insufficiency of the evidence. After careful consideration of Andrew's challenges to the trial court's orders in light of the record and the applicable law, we conclude that the trial court's orders should be affirmed in part and reversed in part and that this case should be remanded to the Forsyth County District Court for the entry of a new dispositional order.

I. Factual BackgroundA. Substantive Facts

On 12 July 2011, Officer J. O. Singletary of the Winston-Salem Police Department received a call concerning a motor vehicle accident. After arriving at the accident scene, Officer Singletary observed a motor vehicle that had collided with a utility pole. The vehicle, which was still warm at the time of Officer Singletary's arrival, was registered to Andrew's mother.

At that point, Officer Singletary noticed Andrew and two other juveniles, who were located about fifty feet from the wreckage and who were "walking briskly" away from the scene. After making this observation, Officer Singletary questioned all three juveniles concerning what had happened. After a five minute conversation, Andrew, who was thirteen years old at the time, admitted that he had been driving the wrecked vehicle.

B. Procedural History

On 25 August 2011, petitions alleging that Andrew should be adjudicated a delinquent juvenile on the grounds that he had committed the offenses of reckless driving in violation of N.C. Gen. Stat. § 20-140(b), operating a motor vehicle without being properly licensed to do so in violation of N.C. Gen. Stat. § 20-7(a), and unauthorized use of a motor vehicle in violation of N.C. Gen. Stat. § 14-72.2 were filed. On 15 December 2011, the petitions that had been filed against Andrew came on for hearing before the trial court. At the conclusion of the adjudication hearing, the trial court adjudicated Andrew to be a delinquent juvenile based upon a determination that he had committed the offenses of unauthorized use of a motor vehicle, operating a motor vehicle without being properly licensed to do so, and reckless dri-

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ving. After conducting the required dispositional hearing, the trial court ordered that Andrew be placed on juvenile probation subject to a number of terms and conditions, including, but not limited to, a requirement that he cooperate with a specified treatment program and attend school daily in the absence of a valid excuse. Andrew noted an appeal to this Court from the trial court's adjudication and dispositional orders.

## II. Legal Analysis

### A. Admissibility of Andrew's Statement

In his initial challenge to the trial court's orders, Andrew contends that the trial court erred by admitting evidence to the effect that he had acknowledged having driven the wrecked vehicle on the grounds that the admission of the challenged evidence violated N.C. Gen. Stat. § 7B-2101, his rights under the decision of the United States Supreme Court in *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966), and his federal and state constitutional rights to be free from compulsory self-incrimination. We do not find Andrew's arguments to be persuasive.

[1] As an initial matter, we note that Andrew did not assert his challenge to the admission of the relevant portion of Officer Singletary's testimony in the court below. Although Andrew argues that his challenge to the admission of the testimony in question based upon N.C. Gen. Stat. § 7B-2101(d) rests upon a statutory mandate which is deemed preserved for purposes of appellate review despite the absence of a contemporaneous objection, *State v. Jones*, 336 N.C. 490, 497, 445 S.E.2d 23, 26 (1994) (citing *State v. Ashe*, 314 N.C. 28, 39-40, 331 S.E.2d 652, 659 (1985)), the Supreme Court has flatly held that challenges to the admissibility of evidence based upon N.C. Gen. Stat. § 7B-2101 must be raised by means of a motion to suppress in order to preserve any challenge to the admission of such evidence for appellate review. *State v. Jenkins*, 311 N.C. 194, 204, 317 S.E.2d 345, 351 (1984) (addressing a claim asserted pursuant to former N.C. Gen. Stat. § 7A-595(a)). Thus, the only basis upon which Andrew is entitled to assert any of his challenges to the admission of his statement to Officer Singletary before the Court is in the event that he can establish the existence of plain error. *State v. Muhammed*, 186 N.C. App. 355, 359, 651 S.E.2d 569, 573 (2007), *appeal dismissed*, 362 N.C. 242, 660 S.E.2d 537 (2008).

"In criminal cases, an issue that was not preserved by objection noted at trial and that is not deemed preserved by rule or law without



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any such action nevertheless may be made the basis of an issue presented on appeal when the judicial action questioned is specifically and distinctly contended to amount to plain error.” N.C.R. App. P. 10(a)(4). An alleged error rises to the level of plain error when it is “‘so basic, so prejudicial, so lacking in its elements that justice cannot have been done.’” *State v. Odom*, 307 N.C. 655, 660, 300 S.E.2d 375, 378 (1983) (quoting *United States v. McCaskill*, 676 F.2d 995, 1002 (4th Cir. 1982), *cert. denied*, 459 U.S. 1018, 103 S. Ct. 381, 74 L. Ed. 2d. 513 (1982)). “Under the plain error rule, defendant must convince this Court not only that there was error, but that absent the error, the jury probably would have reached a different result.” *State v. Jordan*, 333 N.C. 431, 440, 426 S.E.2d 692, 697 (1993). As a result, we review Andrew’s challenges to the admission of his statement to Officer Singletary utilizing a plain error standard of review.

1. Custodial Interrogation

[2] According to N.C. Gen. Stat. § 7B-2101(b), “no in-custody admission or confession resulting from interrogation may be admitted into evidence unless the confession or admission was made in the presence of the juvenile’s parent, guardian, custodian, or attorney.” Similarly, N.C. Gen. Stat. § 7B-2101(d) provides that, “[b]efore admitting into evidence any statement resulting from custodial interrogation, the court shall find that the juvenile knowingly, willingly, and understandingly waived the juvenile’s rights,” with the court being precluded from finding that a “knowing, willing, and understanding” waiver had occurred if the juvenile was not informed of his right to have a parent present. *State v. Fincher*, 309 N.C. 1, 11, 305 S.E.2d 685, 692 (1983). Finally, the decision of the United States Supreme Court in *Miranda*, 384 U.S. at 444-45, 86 S. Ct. at 1612, 16 L. Ed. 2d at 706-07, specifies that a suspect subjected to custodial interrogation must be informed that “he has a right to remain silent, that any statement he does make may be used as evidence against him, and that he has a right to the presence of an attorney, either retained or appointed,” before any statement made during the course of such an interrogation can be used against him at trial. As a result, according to well-established law, “*Miranda* warnings and the protections of N.C. [Gen. Stat.] § 7B-2101 apply only to custodial interrogations.” *In re W.R.*, 363 N.C. 244, 247, 675 S.E.2d 342, 344 (2009) (citing *In re W.R.*, 179 N.C. App. 642, 645, 634 S.E.2d 923, 926 (2006)). In view of the fact that Andrew was never advised of his rights pursuant to N.C. Gen. Stat. § 7B-2101 and *Miranda*, the critical question for our deter-

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mination is the extent, if any, to which Andrew was subjected to a custodial interrogation.

The test for determining if a person is in custody is whether, considering all the circumstances, a reasonable person would not have thought that he was free to leave because he had been formally arrested or had had his freedom of movement restrained to the degree associated with a formal arrest.

*Id.* at 248, 675 S.E.2d at 344. In determining whether a juvenile has been subjected to custodial interrogation, a reviewing court must take a juvenile's age into account "so long as the child's age was known to the officer at the time of police questioning, or would have been objectively apparent to a reasonable officer." *J.D.B. v. North Carolina*, \_\_\_ U.S. \_\_\_, \_\_\_, 131 S. Ct. 2394, 2406, 180 L. Ed. 2d 310, 326 (2011).

In attempting to persuade us that he was being subjected to a custodial interrogation at the time that he admitted having driven the wrecked vehicle, Andrew points to the fact that the law required him to stay at the scene of the accident and contends that, given that he was attempting to leave the scene of the accident by walking "briskly" away at the time of Officer Singletary's arrival, the fact that he remained on the scene after being stopped by Officer Singletary meant that he was "in custody" for purposes of N.C. Gen. Stat. § 7B-2101 and *Miranda*. Neither argument is persuasive.

Admittedly, North Carolina law requires an individual to "remain with the vehicle at the scene of the crash until a law enforcement officer completes the investigation of the crash or authorizes the driver to leave." N.C. Gen. Stat. § 20-166(c). The General Assembly enacted N.C. Gen. Stat. § 20-166 for the purpose of facilitating the investigation of motor vehicle accidents. *State v. Smith*, 264 N.C. 575, 577, 142 S.E.2d 149, 151 (1965) (stating that "[t]he purpose of the requirement that a motorist stop and identify himself is to facilitate investigation"); *State v. Fearing*, 48 N.C. App. 329, 334, 269 S.E.2d 245, 247-48 (1980) (stating that "[t]he general purpose of this statute is to facilitate investigation of automobile accidents and to assure immediate aid to anyone injured by such collision"), *aff'd in part and rev'd in part on other grounds*, 304 N.C. 471, 284 S.E.2d 487 (1981). Aside from the fact that Andrew did not appear to feel constrained by this legal requirement, given his attempt to leave the scene, we are unable to equate a requirement that an individual involved in a motor vehicle

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accident remain on the scene of the accident with a restraint on that individual's freedom equivalent to "a formal arrest." *W.R.*, 363 N.C. at 248, 675 S.E.2d at 344. For example, an individual involved in an accident is typically not handcuffed or confined to a specific location, such as a jail cell or the back seat of a patrol vehicle, but is, instead, free to walk around the immediate vicinity, talk to others who are present, and contact persons who are not present. As a result, we reject the first argument that Andrew advances in support of his claim to have been subjected to a custodial interrogation at the time that he admitted having driven the wrecked vehicle.<sup>2</sup>

Andrew's second argument in support of this contention is equally without merit. In the event that we were to adopt the position espoused in Andrew's brief, any lawful inquiry by an officer at the scene of a motor vehicle accident would automatically be converted into a custodial interrogation. Andrew has not established that Officer Singletary's inquiry subjected him to even a minimal restraint on his freedom of movement or his ability to act as he chose. Even if Andrew did not feel free to go anywhere he wished at the time of his conversation with Officer Singletary, "the fact that a defendant is not free to leave does not necessarily constitute custody for purposes of *Miranda*." *State v. Benjamin*, 124 N.C. App. 734, 738, 478 S.E.2d 651, 653 (1996) (holding that no custodial interrogation for *Miranda*-related purposes occurred during a legitimate pat-down of the defendant, during which an officer found an object that the defendant admitted to be crack cocaine). Based on similar logic, the United States Supreme Court held in *Berkemer v. McCarty*, 468 U.S. 420, 440, 104 S. Ct. 3138, 3150, 82 L. Ed. 2d 317, 334-35 (1984), that "[t]he . . . 'noncoercive aspect of ordinary traffic stops' necessitates the conclusion 'that persons temporarily detained pursuant to such stops are not 'in custody' for the purposes of *Miranda*.'" Therefore, in conducting a routine traffic stop, an "officer may ask the detainee a moderate number of questions to determine his identity and to try to obtain information confirming or dispelling the officer's suspicions" without necessitating the administration of *Miranda* warnings. *Id.* at 439, 104 S. Ct. at 3150, 82 L. Ed. 2d at 334. Thus, we conclude that Officer Singletary did not subject Andrew to custodial interrogation during the course of his roadside investigation into the accident in which Andrew was

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2. The fact that Officer Singletary ran approximately 50 feet to catch up with Andrew does not establish that Andrew was "in custody" for purposes of N.C. Gen. Stat. § 7B-2101 and *Miranda* given the absence of any indication that anything that Officer Singletary did subjected Andrew to a restraint that was tantamount to the loss of liberty inherent in a formal arrest.

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involved. *State v. Clay*, 297 N.C. 555, 559, 256 S.E.2d 176, 180 (1979) (stating that “[n]either *Miranda* warnings nor waiver of counsel is required when police activity is limited to general on-the-scene investigation”), *overruled on other grounds in State v. Davis*, 305 N.C. 400, 415, 290 S.E.2d 574, 583 (1982). As a result, we conclude that Officer Singletary’s testimony that Andrew acknowledged having driven the vehicle involved in the accident was not admitted in violation of N.C. Gen. Stat. § 7B-2101 or *Miranda*.

2. Voluntariness

[3] Secondly, Andrew contends that evidence concerning his statement to Officer Singletary should have been excluded as having been involuntarily made. More specifically, Andrew argues that the necessity created by N.C. Gen. Stat. § 20-166(c1) for him to respond to Officer Singletary’s questions necessitates the conclusion that his admission that he was the driver of the wrecked vehicle was made in violation of his constitutional right against compulsory self-incrimination. We do not find Andrew’s argument persuasive.

According to the Fifth Amendment to the United States Constitution, “[n]o person . . . shall be compelled in any criminal case to be a witness against himself.” U.S. Const., amend. V. As Andrew notes, N.C. Gen. Stat. § 20-166(c) provides, in pertinent part, that “[t]he driver of any vehicle, when the driver knows or reasonably should know that the vehicle which the driver is operating is involved in a crash which results” “[o]nly in damage to property” “shall immediately stop the vehicle at the scene of the crash” and, in the event that “the damaged property is a guardrail, utility pole, or other fixed object owned by the Department of Transportation, a public utility, or other public service corporation,” “give his or her name, address, driver’s license number and the license plate number of his vehicle” “to the nearest peace officer.” Andrew argues that, given that he was under an obligation to provide his “name, address, driver’s license number and the license plate number of the vehicle involved in the crash” to Officer Singletary, his admission that he had been driving the wrecked vehicle was necessarily obtained involuntarily.

In seeking to persuade us of the validity of this argument, Andrew appears to place primary reliance upon *New Jersey v. Portash*, 440 U.S. 450, 459, 99 S. Ct. 1292, 1297, 59 L. Ed. 2d. 501, 510 (1979), in which the United States Supreme Court held that immunized grand jury testimony obtained as the result of the defendant’s compliance with a grand jury subpoena was “the essence of coerced testimony”

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and could not be used to impeach the defendant's trial testimony. However, the principle set out in *Portash* is not applicable to the sort of statutory provision at issue in this case. As the United State Supreme Court stated in *California v. Byers*, 402 U.S. 424, 425, 430-34, 91 S. Ct. 1535, 1539-41, 29 L. Ed. 2d 9, 16, 18-21 (1971) (plurality opinion), which addressed the validity of a defendant's Fifth Amendment challenge to "[a] so-called 'hit and run' statute which requires the driver of a motor vehicle involved in an accident to stop at the scene and give his name and address," such statutes are "in effect in all 50 States and the District of Columbia;" are "essentially regulatory" and intended to implement "the state police power to regulate use of motor vehicles;" and do not violate the Fifth Amendment given that the provision of a name simply "identifies but does not by itself implicate anyone in criminal conduct." Simply put, there is "no constitutional right . . . to flee the scene of an accident in order to avoid the possibility of legal involvement." *Id.* at 434, 91 S. Ct. at 1541, 29 L. Ed. 2d at 21. Thus, since "the Fifth Amendment privilege may not be invoked to resist compliance with a regulatory regime constructed to effect the State's public purposes unrelated to the enforcement of its criminal laws," *Baltimore City Dept. of Social Servs. v. Bouknight*, 493 U.S. 549, 556, 110 S. Ct. 900, 905, 107 L. Ed. 2d 992, 1000 (1990); since the mere requirement that an individual disclose his name to an investigating officer on the scene of a motor vehicle accident does not necessarily have incriminating effect;<sup>3</sup> and since the record contains no additional information tending to suggest that Andrew's admission that he had been driving the wrecked vehicle resulted from any coercive conduct on the part of Officer Singletary, we conclude that Andrew's voluntariness challenge to the admission of his statement to Officer Singletary lacks merit. As a result, since none of Andrew's challenges to the admission of Officer Singletary's testimony to the effect that he had acknowledged having been the driver of the wrecked vehicle have merit, the trial court did not err, much less commit plain error, by receiving and considering the challenged portion of Officer Singletary's testimony. *State v. Shuford*, 337 N.C. 641, 647, 447 S.E.2d 742, 745 (1994) (stating, "[w]e find no error in the above instructions and, consequently, no plain error").

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3. Although Andrew attempts to equate the provision of his name and address with an admission that he unlawfully operated the wrecked vehicle, we do not see any reason why such evidence of his identification necessarily constituted an admission that he had been engaged in unlawful conduct.

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B. Sufficiency of the Evidence

Secondly, Andrew argues that the trial court erred by denying his motion to dismiss the petitions alleging that he should be adjudicated a delinquent juvenile for committing the offenses of unauthorized use of a motor vehicle, reckless driving, and operating a motor vehicle without being properly licensed to do so. Although the trial court correctly refused to dismiss the petition alleging that Andrew should be adjudicated delinquent for driving without a valid operator's license, it erred by denying his motions to dismiss the petitions alleging that Andrew should be adjudicated delinquent for committing the offenses of reckless driving and unauthorized use of a motor vehicle.

A "juvenile is therefore 'entitled to have the evidence evaluated by the same standards as apply in criminal proceedings against adults.'" *In re Heil*, 145 N.C. App. 24, 28, 550 S.E.2d 815, 819 (2001) (quoting *In re Dulaney*, 74 N.C. App. 587, 588, 328 S.E.2d 904, 906 (1985)). "Upon defendant's motion for dismissal, the question for the Court is whether there is substantial evidence (1) of each essential element of the offense charged, or of a lesser offense included therein, and (2) of defendant's being the perpetrator of such offense. If so, the motion is properly denied." *State v. Powell*, 299 N.C. 95, 98, 261 S.E.2d 114, 117 (1980). "[U]pon a motion to dismiss in a criminal action, all of the evidence, whether competent or incompetent, must be considered in the light most favorable to the state, and the state is entitled to every reasonable inference therefrom." *State v. Smith*, 300 N.C. 71, 78, 265 S.E.2d 164, 169 (1980). "This Court reviews the trial court's denial of a motion to dismiss *de novo*." *State v. Smith*, 186 N.C. App. 57, 62, 650 S.E.2d 29, 33 (2007).

1. Reckless Driving

**[4]** According to N.C. Gen Stat. § 20-140(b), "[a]ny person who drives any vehicle upon a highway or any public vehicular area without due caution and circumspection and at a speed or in a manner so as to endanger or be likely to endanger any person or property shall be guilty of reckless driving." Although the record contains evidence which would suffice to show that Andrew was driving a vehicle registered to his mother at the time of the wreck and that the vehicle that he was driving had collided with a utility pole, the record contains no evidence tending to show that the collision resulted from any carelessness or reckless driving on Andrew's part.<sup>4</sup> The mere fact that an unli-

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4. Although the State claims that Andrew was driving at a high rate of speed prior to the collision, we are unable to find any testimony to that effect in the record developed in the trial court.

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censed driver ran off the road and collided with a utility pole does not suffice to establish a violation of N.C. Gen. Stat. § 20-140(b). As a result, the trial court erred by denying Andrew's motion to dismiss the petition alleging that he should be adjudicated a delinquent juvenile for driving in a reckless manner.

## 2. Unauthorized Use of a Motor Vehicle

[5] "A person is guilty of [unauthorized use of a motor vehicle] if, without the express or implied consent of the owner or person in lawful possession, he takes or operates an aircraft, motorboat, motor vehicle, or other motor-propelled conveyance of another." N.C. Gen. Stat. § 14-72.2(a). Although, as we have already noted, the record contains evidence tending to show that Andrew was operating a motor vehicle registered to his mother at the time that this vehicle collided with a utility pole, the record contains no evidence tending to show that Andrew was utilizing the vehicle in question without his mother's consent. The mere fact that an under-aged, unlicensed individual operated a motor vehicle registered to another person does not, without more, suffice to establish the required lack of consent. As a result, the trial court erred by denying Andrew's motion to dismiss the petition alleging that he should be adjudicated delinquent for committing the offense of unauthorized use of a motor vehicle.

## 3. No Operator's License

[6] According to N.C. Gen. Stat. § 20-7(a), "a person must be licensed by the Division" "[t]o drive a motor vehicle on a highway." Although the record contains ample evidence tending to show that Andrew admitted having driven the vehicle that collided with a utility pole, Andrew contends that the record does not contain sufficient evidence to support a determination that he operated a motor vehicle without being properly licensed to do so on the basis of the *corpus delicti* rule. We do not find Andrew's argument persuasive.<sup>5</sup>

The *corpus delicti* rule prohibits convictions resting upon a criminal defendant's confession in the absence of proof that "the injury or harm constituting the crime occurred" and that "this injury or harm was caused by someone's criminal activity." *State v. Parker*, 315 N.C.

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5. Although Andrew's argument in reliance on the "*corpus delicti* rule" encompasses all three of the offenses that he is alleged to have committed, we need not address this argument as it pertains to the trial court's determinations that Andrew should be adjudicated delinquent for committing the offenses of reckless driving and unauthorized use of a motor vehicle given our decision that the record did not contain sufficient evidence to support a finding that Andrew committed those offenses.

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222, 231, 337 S.E.2d 487, 492 (1985). The principal purpose of the *corpus delicti* rule is ensuring “that a defendant will [not] be convicted of a crime that has not been committed.” 315 N.C. at 235, 337 S.E.2d at 494. After a detailed analysis of the nature and proper scope of the *corpus delicti* rule, the Supreme Court has held that:

when the State relies upon the defendant’s confession to obtain a conviction [in a non-capital case], it is no longer necessary that there be independent proof tending to establish the *corpus delicti* of the crime charged if the accused’s confession is supported by substantial independent evidence tending to establish its trustworthiness, including facts that tend to show the defendant had the opportunity to commit the crime.

*Id.* at 236, 337 S.E.2d at 495.

The record developed in the trial court is more than sufficient to support a determination that Andrew operated a motor vehicle without being properly licensed to do so. Aside from Andrew’s admission that he had been operating the wrecked vehicle, the record contains ample evidence that a crime was actually committed. According to Officer Singletary, the motor vehicle which he discovered upon arrival at the accident scene was still warm, a fact which tends to show that this car had recently been driven. In addition, the record clearly establishes that the only persons in the vicinity of the accident scene at the time of Officer Singletary’s arrival were Andrew and his friends and that the wrecked vehicle was registered to Andrew’s mother. As a result, we conclude that the record contains ample additional evidence tending to establish the trustworthiness of Andrew’s admission, thereby adequately supporting the trial court’s denial of Andrew’s motion to dismiss the allegation that he should be adjudicated delinquent for operating a motor vehicle without being properly licensed to do so. *State v. Trexler*, 316 N.C. 528, 333, 342 S.E.2d 878, 881 (1986) (holding that the record contained sufficient evidence to support the defendant’s impaired driving conviction in addition to his confession given that an “overturned automobile was lying in the middle of the road;” that “a single person was seen leaving the automobile;” that, “when defendant returned to the scene, he appeared to be impaired as a result of using alcohol;” that “defendant later blew 0.14 on a breathalyzer;” and that “the wreck was otherwise unexplained”).



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III. Conclusion

Thus, for the reasons set forth above, we hold that the trial court erred by denying Andrew's motion to dismiss the petitions alleging that he should be adjudicated delinquent for committing the offenses of reckless driving and unauthorized use of a motor vehicle and that the trial court properly denied Andrew's motion to dismiss the petition alleging that he should be adjudicated delinquent for operating a motor vehicle without being properly licensed to do so. As a result, the trial court's adjudication orders are affirmed in part and reversed in part, with this case being remanded to the Forsyth County District Court for any needed additional proceedings not inconsistent with this opinion, including the entry of a new disposition order.

AFFIRMED IN PART; REVERSED IN PART; AND REMANDED.

Judges ROBERT N. HUNTER, JR., and McCULLOUGH concur.

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IN THE MATTER OF D.C.

No. COA12-893

Filed 5 February 2013

**1. Termination of Parental Rights—authority to file petition—guardianship—permanent planning review**

The trial court did not err in a termination of parental rights case by concluding petitioners had authority to file a petition to terminate respondents' parental rights after the trial court ordered guardianship as the permanent plan. The guardians' petition seeking to terminate respondent's parental rights was proper, and respondent's contention that another permanency planning review hearing should have been held prior to the filing of the termination petition had no merit.

**2. Termination of Parental Rights—grounds—failure to make reasonable progress—sufficiency of findings of fact**

The trial court did not err in a termination of parental rights case by concluding that respondent mother's failure to make reasonable progress was supported by the findings of fact. Because the trial court did not err in terminating respondent's parental

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rights on at least one ground for termination pursuant to N.C.G.S. § 7B-1111, the Court of Appeals did not need to address respondent's arguments regarding the grounds of neglect or willful abandonment.

Appeal by respondent from order entered 1 May 2012 by Judge Jeffrey E. Noecker in District Court, New Hanover County. Heard in the Court of Appeals 3 January 2013.

*No brief filed for petitioner-appellees.*

*Parker Poe Adams & Bernstein LLP, by William L. Esser IV, for guardian ad litem.*

*Jeffrey L. Miller for respondent-appellant mother.*

STROUD, Judge.

Respondent mother appeals from the trial court's 1 May 2012 order terminating her parental rights in her minor child.<sup>1</sup> We affirm.

On 17 November 2004, the New Hanover County Department of Social Services ("DSS") filed a juvenile petition alleging Don,<sup>2</sup> then three years old, to be neglected and dependent due to severe injuries he sustained from a dog attack in the home. DSS obtained non-secure custody, and the child was placed in foster care. The minor child was adjudicated neglected on 13 January 2005, and the allegation of dependency was dismissed. On 14 July 2005, the permanent plan was changed from reunification to adoption and DSS was authorized to pursue termination of parental rights.

After another permanency planning review hearing held on 29 November 2007, the trial court changed the permanent plan for Don to guardianship and granted guardianship to the child's foster parents. Respondent appealed to this Court, which affirmed the order in an opinion filed on 15 July 2008. *In re D.C.*, 191 N.C. App. 399, 663 S.E.2d 13 (2008) (unpublished).

On 27 May 2011, respondent filed a *pro se* motion for review. Due to the passage of time, new counsel and a guardian *ad litem* were appointed to represent respondent and a guardian *ad litem* was

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1. The order also terminated the rights of the juvenile's father, who has not filed an appeal.

2. The trial court specifically found Ms. Sargent's testimony credible and relied on the information she provided.

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appointed for the minor child. On 29 August 2011, respondent's attorney filed a new motion for review. Respondent's *pro se* motion was dismissed on 23 December 2011.

On 19 October 2011, Don's guardians filed a petition to terminate respondent's parental rights. The petition alleged respondent parents neglected and/or abused the minor child, willfully left the minor child in placement outside the home for more than twelve months without making reasonable progress to correct the conditions that led to the removal of the child, are incapable of providing for the proper care and supervision of the child, failed to pay support for the child, and willfully abandoned the child.

The termination petition and the August motion for review were consolidated for a hearing held on 9 January and 20 February 2012. The trial court entered its order on 1 May 2012 terminating respondent's parental rights to the minor child based on neglect, failure to make reasonable progress, and willful abandonment. The court also denied respondent's motion for review. Respondent appeals.

"The standard for review in termination of parental rights cases is whether the findings of fact are supported by clear, cogent and convincing evidence and whether these findings, in turn, support the conclusions of law." *In re Clark*, 72 N.C. App. 118, 124, 323 S.E.2d 754, 758 (1984).

Respondent challenges the findings of fact relating to each of the three grounds contained in the order as being unsupported by the evidence and argues that the findings of fact do not support the trial court's conclusions. Further, respondent argues petitioners had no authority to file a petition to terminate her parental rights after the trial court ordered guardianship as the permanent plan. We address the latter issue first.

[1] Respondent notes that in the 14 December 2007 order establishing guardianship as the permanent plan for the minor child, the trial court did not close the juvenile case or relieve DSS of responsibility for reunification but instead directed DSS to participate in helping respondent reestablish a relationship with the minor child. Respondent argues that the guardians were not parties to the juvenile case, nor did they seek to intervene as parties at any point in the case. She asserts that a hearing should have been held in order to allow her to contest a change in the permanent plan from guardianship to termination of her rights. She argues that without an order from the trial court changing the permanent plan and without making DSS a party,

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“the guardians unilaterally commenced a private action for termination by filing their petition in October 2011.” We agree that this is what the guardians did; that action, however, is specifically authorized by the Juvenile Code.

N.C. Gen. Stat. § 7B-1103, which governs “Who may file a petition or motion” to terminate a parent’s rights, permits “[a]ny person who has been judicially appointed as the guardian of the person of the juvenile” to file such a petition or motion. N.C. Gen. Stat. § 7B-1103(a)(2) (2011). Despite respondent’s arguments, the Juvenile Code places no preliminary requirements on guardians before they may file a petition or motion to terminate a parent’s rights. Therefore, the guardians’ petition seeking to terminate respondent’s parental rights was proper, and respondent’s contention that another permanent planning review hearing should have been held prior to the filing of the termination petition has no merit.

**[2]** Respondent contends the grounds of neglect and failure to make reasonable progress are not supported by the findings of fact or the evidence.

To terminate a parent’s rights pursuant to N.C. Gen. Stat. § 7B-1111(a)(2), it must be shown by clear and convincing evidence that the parent (1) willfully left the child in placement outside the home for more than twelve months, and (2) as of the time of the termination hearing, failed to make reasonable progress under the circumstances to correct the conditions that led to the child’s removal. *In re O.C.*, 171 N.C. App. 457, 464-65, 615 S.E.2d 391, 396, *disc. review denied*, 360 N.C. 64, 623 S.E.2d 587 (2005). The trial court’s order must contain adequate findings of fact as to whether the parent acted willfully and as to whether the parent made reasonable progress under the circumstances. *In re C.C.*, 173 N.C. App. 375, 384, 618 S.E.2d 813, 819 (2005). We have stated that “[w]illfulness is established when the respondent had the ability to show reasonable progress, but was unwilling to make the effort.” *In re McMillon*, 143 N.C. App. 402, 410, 546 S.E.2d 169, 175, (citation omitted), *disc. review denied*, 354 N.C. 218, 554 S.E.2d 341 (2001). “A finding of willfulness is not precluded even if the respondent has made some efforts to regain custody of the child[.]” *In re Nolen*, 117 N.C. App. 693, 699, 453 S.E.2d 220, 224 (1995).

Respondent first argues that the condition which led to Don’s removal from the home, a dangerous environment due to the dog attack, no longer exists. She notes that the dog was destroyed, there

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was no evidence of another dog in the home, and that respondent's home was reported to be "clean and tidy" by DSS in 2007. At the time of the termination hearing in 2012, she had maintained custody of one of her other children for three years and she had regular extended visitation with her other two minor children. She argues that because her home was deemed appropriate for her to have custody of one of her children and she had made progress in other aspects of her life, the trial court had no basis for determining that she willfully left the minor child in foster care. We do not agree.

Police officers who responded to the attack on Don killed the dog that night, even before Don was adjudicated neglected. Don was removed from respondent's custody because of the injurious environment in respondent's home and the lack of proper care and supervision therein; the dog attack was just one of the manifestations of the injurious environment. Don was removed not merely because of the attack, but because respondent had the poor judgment to leave her young child with a dangerous animal. Ms. Sargent testified that respondent still does not understand the nature of Don's injuries or the trauma he experienced.<sup>3</sup> This lack of understanding of the seriousness of Don's injuries and post-traumatic stress caused by the dog attack reflects the same underlying condition that led to Don's removal—respondent's failure to understand what constitutes a danger to Don's health, safety, and welfare. Evidence of respondent's lack of reasonable progress toward understanding the significance of Don's injuries, and the trauma he suffered as a result, therefore, constitutes evidence of a failure to correct the injurious environment that led to Don's removal. The reunification plan was meant in part to educate respondent about these issues and to enable her to reestablish her relationship with Don.

The court found that the child's therapist, Ms. Sargent, was charged with establishing a plan for respondent to work on reunification with the minor child. The plan included having an individual meeting between Ms. Sargent and respondent before any visits with the child could take place. Ms. Sargent communicated multiple times with respondent regarding the need to set up such an appointment, but respondent did not do so until 19 January 2012, after the first hearing in the termination proceedings and over four years after the last order entered in the case.

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3. The trial court specifically found Ms. Sargent's testimony credible and relied on the information she provided.

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The court found as fact that the child had been in the care of the guardians since December 2004, and that the last visit between the child and respondent took place in 2005. The trial court also found that respondent did not believe her child was scared of her or of going to live with her and did not believe the letters she received from the child in which he stated his desire to be adopted by his foster parents were actually written by him.

Based upon our review of the transcript, Ms. Sargent's testimony supports the findings that respondent was told what she had to do to progress toward visits with the minor child, that Ms. Sargent talked to respondent about needing to set up an appointment on multiple occasions, and that respondent failed to do so. Despite respondent's contention that a plan was never put in writing, Ms. Sargent's testimony, determined by the trial judge to be credible, clearly showed that respondent knew what she had to do and she failed to do it. Although respondent testified that she did not attempt to make an appointment because Ms. Sargent told her the child wasn't ready for visitation, respondent was supposed to meet with Ms. Sargent separately first as a preliminary step toward visitation, and she did not take that step in the four years after guardianship became the permanent plan. Moreover, the December 2007 order establishing guardianship of the child specifically stated that any party could go back to court by filing a motion. Respondent waited over three and a half years before seeking help with visitation by filing a motion for review in the trial court.

The findings of fact that respondent did not believe the letters sent to her by the minor child were actually written by him, or that the minor child was scared of her and of coming to live with her are supported by respondent's testimony as well as Ms. Sargent's testimony. Respondent's inability to acknowledge and comprehend the severity of the minor child's trauma indicates a lack of progress despite respondent's years of counseling with her own therapist.

Given these circumstances, we conclude that the trial court's findings of fact were supported by the evidence and those findings supported the court's determination under N.C. Gen. Stat. § 7B-1111(a)(2) that respondent willfully left Don in placement outside the home for more than 12 months and failed to make reasonable progress to correct the conditions that led to Don's removal. Therefore, it was not error for the trial court to terminate respondent's parental rights on this ground.

## IN RE E.J.

[225 N.C. App. 333 (2013)]

Because the trial court did not err in terminating respondent's parental rights on at least one ground for termination pursuant to N.C. Gen. Stat. § 7B-1111, we need not address respondent's arguments regarding the grounds of neglect or willful abandonment. *See In re Humphrey*, 156 N.C. App. 533, 540, 577 S.E.2d 421, 426 (2003) (a finding of one statutory ground is sufficient to support the termination of parental rights). The order of the trial court is affirmed.

AFFIRMED.

Chief Judge MARTIN and Judge ERVIN concur.

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IN THE MATTER OF E.J.

No. COA12-673

Filed 5 February 2013

**1. Parties—proper party—juvenile neglect and dependency—parent**

Although respondent mother was not served with the juvenile petition in a neglect and dependency case, she was a proper party to appeal the adjudication and disposition order under N.C.G.S. § 7B-1002.

**2. Child Abuse, Dependency, and Neglect—adjudication and disposition order—lack of subject matter jurisdiction**

The trial court lacked subject matter jurisdiction in a juvenile neglect and dependency case to enter the 4 April 2012 adjudication and disposition order. The order lacked specific findings of fact and conclusions of law that the North Carolina court met the requirements of N.C.G.S. §§ 50A-201(a)(1) or 50A-201(a)(2) such that it could make a modification under N.C.G.S. § 50A-203. While the trial court had temporary jurisdiction to enter the continued non-secure child custody orders, the trial court did not have jurisdiction, exclusive or temporary, to enter the juvenile adjudication and disposition order.

Appeal by respondent–mother from order entered 4 April 2012 by Judge Betty J. Brown in Guilford County District Court. Heard in the Court of Appeals 3 January 2013.

## IN RE E.J.

[225 N.C. App. 333 (2013)]

*Mercedes O. Chut, for petitioner–appellee, Guilford County Department of Social Services.*

*Margaret F. Rowlett, for Guardian ad Litem.*

*Leslie Rawls, for respondent–appellant, mother.*

MARTIN, Chief Judge.

Mother appeals from an order that adjudicated her son neglected and dependent, and placed him in the temporary legal custody of the Guilford County Department of Social Services (“DSS”). For the following reasons, we vacate and remand.

On or about 23 January 2012, fourteen-year-old E.J. and his father were returning to Tennessee after a weekend trip to Fayetteville, North Carolina, when they stopped at a gas station in Greensboro. Following an argument with his father, E.J. called police and informed them that his father was trying to fight him and that they had been living out of a car. Greensboro Police officers brought E.J. to DSS.

The next day, DSS filed a juvenile petition alleging E.J. was a neglected and dependent juvenile. In the petition, DSS alleged that the father and E.J. had traveled to Fayetteville, North Carolina, in the hopes of finding an apartment; that the father was diagnosed with bipolar disorder; and that E.J.’s relatives in the area were unwilling to take E.J. into their homes. DSS further alleged that mother, who lived in New Hampshire, informed DSS that she was unable to care for E.J.; that she admitted to DSS that several of her children had been removed from her care and placed in the custody of social services in New York; and that she acknowledged paying \$100.00 per month in child support towards E.J.’s care. A summons was personally served on the father, but the summons mailed to mother was not returned and the record does not indicate that she was served through any other means. The trial court entered an initial order for non-secure custody based upon E.J. being abandoned.

The trial court held a hearing on 25 January 2012 and entered an order for continued non-secure custody on 1 February 2012. The court found that there was prior child protective services history in Clinton County, New York, and that DSS was to provide the name and phone number of “the Judge in Clinton County, NY” so the court could speak with the New York judge. The trial court entered another



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order for continued non-secure custody on 10 February 2012. The trial court found that:

This court spoke w/ Judge Timothy Lawless, presiding judge in Clinton County, New York. Judge Lawless has not determined if Clinton County should retain custody [sic], but will make determination and notify this court prior to next hearing. Appropriate for this Ct. to exercise emergency jurisdiction for the purpose of continuing custody with GCDSS.

The trial court ordered E.J. to remain in the non-secure custody of DSS and set the adjudication hearing for March 2012.

The trial court conducted an adjudication and disposition hearing on 9 March 2012. At the start of the hearing, the trial court was advised that mother had not been served with the juvenile petition and she was not present for the hearing. The parties also advised the court that mother, through her attorney, had filed a motion in limine seeking to exclude oral statements mother made to DSS personnel. The trial court did not rule on the motion in limine as mother had not been served with the petition and dismissed mother's provisional counsel based upon mother's failure to appear. By order filed 4 April 2012, the trial court adjudicated E.J. to be a dependent and neglected juvenile. The trial court concluded that "[t]his matter is properly before the Court and the Court has jurisdiction over the parties and subject matter of this action" and ordered "[t]his matter is retained for further orders of the court." Mother appeals.

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**[1]** We first address DSS and the Guardian ad Litem's ("GAL") assertion that mother lacks standing to bring this appeal. Although mother was not served with the juvenile petition, she is a proper party to appeal the adjudication and disposition order. N.C.G.S. §§ 7B-1001 and 7B-1002 designate when a right to appeal exists in a juvenile matter and which persons possess the right to appeal. N.C. Gen. Stat. §§ 7B-1001 & 7B-1002 (2011). N.C.G.S. § 7B-1001 provides that "[a]ny initial order of disposition and the adjudication order upon which it is based" may be appealed directly to this Court. N.C. Gen. Stat. § 7B-1001(a)(3). Under N.C.G.S. § 7B-1002, which is entitled "Proper parties for appeal[.]" an appeal may be taken by "[a] parent[.]" N.C. Gen. Stat. § 7B-1002(4). Accordingly, as mother is E.J.'s parent, she may pursue the present appeal from the adjudication and disposition order. We now turn to the merits of mother's arguments.

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**[2]** Mother contends the trial court lacked subject matter jurisdiction to enter the 4 April 2012 adjudication and disposition order. We agree.

Whether the trial court had subject matter jurisdiction is a question of law, and is reviewed *de novo* on appeal. *Powers v. Wagner*, \_\_\_ N.C. App. \_\_\_, \_\_\_, 716 S.E.2d 354, 357 (2011). Subject matter jurisdiction is the threshold requirement for a court to hear and adjudicate a controversy brought before it. *In re McKinney*, 158 N.C. App. 441, 443, 581 S.E.2d 793, 795 (2003). The North Carolina Juvenile Code grants our district courts “exclusive, original jurisdiction over any case involving a juvenile who is alleged to be abused, neglected, or dependent.” N.C. Gen. Stat. § 7B-200(a) (2011). However, the jurisdictional requirements of the Uniform Child Custody Jurisdiction Enforcement Act (“UCCJEA”) and the Parental Kidnapping Prevention Act (“PKPA”) must also be satisfied for a court to have authority to adjudicate petitions filed pursuant to our juvenile code. *In re Brode*, 151 N.C. App. 690, 692-94, 566 S.E.2d 858, 860-61 (2002).

Jurisdiction under the UCCJEA may be either “exclusive, continuing” or “temporary emergency.” See N.C. Gen. Stat. §§ 50A-201–204 (2011). “The first provision of the UCCJEA, [N.C.G.S. § 50A-201], addresses the jurisdictional requirements for initial child-custody determinations.” *In re J.W.S.*, 194 N.C. App. 439, 446, 669 S.E.2d 850, 854 (2008). According to N.C.G.S. § 50A-102(8), an “initial determination” is “the first child-custody determination concerning a particular child.” N.C. Gen. Stat. § 50A-102(8) (2011). A court that properly makes an initial determination will have “exclusive, continuing jurisdiction” until the happening of certain enumerated events which cause the court to lose that jurisdiction. See N.C. Gen. Stat. § 50A-202. These events include, *inter alia*, when a court “determines that the child, the child’s parents, and any person acting as a parent do not presently reside in [the state that made the initial determination].” *Id.* Either the state that made the initial child-custody determination or another state may make the determination that none of the enumerated parties continue to reside in that state. N.C. Gen. Stat. § 50A-203(2); Official Comment to N.C. Gen. Stat. § 50A-203; Official Comment to N.C. Gen. Stat. § 50A-202 (“If the child, the parents, and all persons acting as parents have all left the State which made the custody determination prior to the commencement of the modification proceeding, considerations of waste of resources dictate that a court in State B, as well as a court in State A, can decide that State A has lost exclusive, continuing jurisdiction.”).

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A North Carolina court may not modify another court's child-custody determination unless:

a court of this State has jurisdiction to make an initial determination under G.S. 50A-201(a)(1) or G.S. 50A-201(a)(2) *and*:

(1) The court of the other state determines it no longer has exclusive, continuing jurisdiction under G.S. 50A-202 or that a court of this State would be a more convenient forum under G.S. 50A-207; *or*

(2) A court of this State or a court of the other state determines that the child, the child's parents, and any person acting as a parent do not presently reside in the other state.

N.C. Gen. Stat. § 50A-203 (emphasis added). The requirements for an "initial determination" under N.C.G.S. § 50A-201(a)(1) and 50A-201(a)(2) state:

[A] court of this State has jurisdiction to make an initial child-custody determination only if:

(1) This State is the home state of the child on the date of the commencement of the proceeding, or was the home state of the child within six months before the commencement of the proceeding, and the child is absent from this State but a parent or person acting as a parent continues to live in this State;

(2) A court of another state does not have jurisdiction under subdivision (1), or a court of the home state of the child has declined to exercise jurisdiction on the ground that this State is the more appropriate forum under G.S. 50A-207 or G.S. 50A-208, and:

a. The child and the child's parents, or the child and at least one parent or a person acting as a parent, have a significant connection with this State other than mere physical presence; and

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b. Substantial evidence is available in this State concerning the child's care, protection, training, and personal relationships;

N.C. Gen. Stat. § 50A-201(a).

A court that cannot meet the requirements for exclusive, continued jurisdiction may, nevertheless, exercise "temporary emergency" jurisdiction under the UCCJEA. *See* N.C. Gen. Stat. § 50A-204. Under N.C.G.S. § 50A-204(a), temporary emergency jurisdiction may be invoked by a court if a "child is present in this State and the child has been abandoned or it is necessary in an emergency to protect the child because the child, or a sibling or parent of the child, is subjected to or threatened with mistreatment or abuse." N.C. Gen. Stat. § 50A-204(a). The statute further provides:

(c) If there is a previous child-custody determination that is entitled to be enforced under this Article, . . . any order issued by a court of this State under this section must specify in the order a period that the court considers adequate to allow the person seeking an order to obtain an order from the state having jurisdiction . . . . The order issued in this State remains in effect until an order is obtained from the other state within the period specified or the period expires.

N.C. Gen. Stat. § 50A-204(c). "When the court invokes emergency jurisdiction, any orders entered shall be temporary protective orders only." *In re Brode*, 151 N.C. App. at 693, 566 S.E.2d at 860 (citing *In re Malone*, 129 N.C. App. 338, 343, 498 S.E.2d 836, 839 (1998)).

To exercise either emergency or exclusive jurisdiction, the trial court must make specific findings of fact to support such an action. *Williams v. Williams*, 110 N.C. App. 406, 411, 430 S.E.2d 277, 281 (1993) ("In exercising jurisdiction over child custody matters, North Carolina requires the trial court to make specific findings of fact supporting its actions.").

In this case, it appears the trial court first learned of the possibility of a valid New York child-custody order at the 25 January 2012 hearing. After making contact with Judge Lawless of Clinton County, New York, the trial court properly entered its February 2012 order that continued non-secure custody and concluded it had emergency jurisdiction as the New York court had not determined at that time

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whether New York would retain jurisdiction. Then, in its adjudication and disposition order, the trial court summarily concluded it had “jurisdiction over the . . . subject matter of this action.” However, there is no finding of fact, order, or any other indication in the record showing that the New York court had opted not to exercise its jurisdiction in this matter. And while it appears from the record that neither of the parents nor E.J. continue to live in New York, there is no specific finding of fact or conclusion of law concerning the status of the New York court’s exclusive, continuing jurisdiction. Even if the trial court had supported a conclusion that New York no longer had exclusive, continuing jurisdiction because none of the parties continued to reside in New York with adequate findings of fact, the order still lacked specific findings of fact and conclusions of law that the North Carolina court met the requirements of N.C.G.S. § 50A-201(a)(1) or 50A-201(a)(2) such that it could make a modification under N.C.G.S. § 50A-203. Without these specific findings, the order was insufficient to invoke exclusive jurisdiction in North Carolina. *See Williams*, 110 N.C. App. at 411, 430 S.E.2d at 281.

The adjudication and disposition order is also insufficient to invoke temporary emergency jurisdiction under N.C.G.S. § 50A-204. The trial court could only enter an order under its temporary emergency jurisdiction for a specific period of time. *See* N.C. Gen. Stat. § 15A-204(c); *In re Brode*, 151 N.C. App. at 693, 566 S.E.2d at 860. The trial court’s order of 4 April 2012 does not state a period at the end of which the order will expire. Indeed, the trial court’s order states that the matter was “retained for further orders of the court” and establishes a permanent plan for E.J. Therefore, the order, by its terms, is insufficient to establish the court’s temporary emergency jurisdiction over this action.

Accordingly, while the trial court had temporary jurisdiction to enter the continued non-secure custody orders, the trial court did not have jurisdiction, exclusive or temporary, to enter the juvenile adjudication order. Thus, we vacate the trial court’s order entered 4 April 2012.

Vacated and remanded for proceedings consistent with this opinion and the dictates of the UCCJEA and PKPA.

Judges STROUD and ERVIN concur.

**KING v. BRYANT**

[225 N.C. App. 340 (2013)]

ROBERT E. KING AND WIFE, JO ANN O'NEAL, PLAINTIFFS

v.

MICHAEL S. BRYANT, M.D. AND VILLAGE SURGICAL ASSOCIATES, P.A., DEFENDANTS

No. COA12-918

Filed 5 February 2013

**1. Appeal and Error—interlocutory orders—substantial right—denial of motion to compel arbitration**

The denial of a motion to compel arbitration, although interlocutory, is immediately appealable because it affects a substantial right.

**2. Arbitration and Mediation—Federal Arbitration Act—medical malpractice**

To the extent the parties entered into a valid agreement to arbitrate in a medical malpractice case, federal law and the provisions of the Federal Arbitration Act governed.

**3. Arbitration and Mediation—indefiniteness—failure to agree on panel of arbitrators**

The trial court erred in a medical malpractice case by concluding that the parties' arbitration agreement was too indefinite to be enforced. The failure of the parties to agree on a panel of arbitrators did not render the agreement indefinite.

**4. Appeal and Error—preservation of issues—failure to raise at trial**

Although plaintiffs' wanted the Court of Appeals to address the issues in a medical malpractice case that the parties' agreement was unconscionable and that the agreement was inapplicable to Ms. O'Neal's loss of consortium claim, it declined because the trial court has not yet ruled on these questions and needed to make findings of fact.

Appeal by defendants from order entered 23 March 2012 by Judge Lucy N. Inman in Cumberland County Superior Court. Heard in the Court of Appeals 13 December 2012.

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[225 N.C. App. 340 (2013)]

*Patterson Harkavy LLP, by Burton Craige and Narendra K. Ghosh, and Beaver Holt Sternlicht & Courie P.A., by Mark A. Sternlicht, for plaintiff-appellee.*

*Walker, Allen, Grice, Ammons & Foy, L.L.P., by O. Drew Grice, Jr., for defendant-appellants.*

HUNTER, JR., Robert N., Judge.

Michael S. Bryant, M.D. (“Dr. Bryant”) and Village Surgical Associates, P.A. (collectively, “Defendants”) appeal from an order of the Cumberland County Superior Court denying their “Motion to Stay Proceedings and Enforce Arbitration Agreement.” For the following reasons, we reverse and remand.

**I. Factual and Procedural History**

This appeal arises out of a medical malpractice suit brought by Robert E. King and his wife, Jo Ann O’Neal (collectively, “Plaintiffs”). On 14 May 2009, Mr. King underwent a surgical procedure to repair a bilateral inguinal hernia at Fayetteville Ambulatory Surgery Center. During the procedure, Dr. Bryant inserted a trochar into Mr. King’s abdomen and injured his aorta, causing extensive bleeding. Dr. Bryant was able to stop the bleeding and repair the injured aorta. After the surgery, Mr. King was transferred to Cape Fear Valley Health Systems for further care, including an additional surgical procedure to address complications from the injury to his aorta. Mr. King remained hospitalized until 26 May 2009.

Plaintiffs filed suit on 28 September 2011, alleging medical malpractice on the part of Dr. Bryant and seeking recovery from Defendants for medical expenses, lost wages, physical injuries, pain and suffering, and Ms. O’Neal’s loss of consortium. In response to Plaintiffs’ complaint, Defendants filed their answer and a “Motion to Stay Proceedings and Enforce Arbitration Agreement.” In it, Defendants sought enforcement of an “Agreement to Alternative Dispute Resolution” (“the Agreement”) executed by Mr. King prior to his hernia surgery. The Agreement read in pertinent part as follows:

**Agreement To Alternative Dispute Resolution**

In accordance with the terms of the Federal Arbitration Act, 9 USC 1-16, I agree that any dispute arising out of or related to the provision of healthcare services by me, by Village Surgical Associates, PA, or its employees,

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physician members and agents, shall be subject to final and binding resolution through private arbitration.

The parties to this Agreement shall agree upon three Arbitrators and at least one arbitrator of the three shall be a physician licensed to practice medicine and shall be board certified in the same specialty as the physician party. The remaining Arbitrators either shall be licensed to practice law in NC or licensed to practice medicine in NC. The parties shall agree upon all rules that shall govern the arbitration, but may be guided by the Health Care Claim Settlement Procedures of the American Arbitration Association, a copy of which is available to me upon request. I understand that this agreement includes all health care services which previously have been or will in the future be provided to me, and that this agreement is not restricted to those health care services rendered in connection with any particular treatment, office or hospital admission. I understand that this agreement is also binding on any individual or entity and not a precondition to receiving health care services.

On 6 November 2011, Plaintiffs filed a response to Defendants' motion, arguing that the Agreement is unenforceable. Defendants' filed their "Motion to Compel Arbitration" on 13 February 2012, and a hearing was held on 12 March 2012. At the conclusion of the hearing, the trial court denied Defendants' motion, concluding as a matter of law that a contract had not been formed between the parties. In its order, the trial court reasoned that:

3. The Agreement to Alternative Dispute Resolution contains provisions regarding the selection of three arbitrators and the rules that shall govern the arbitration, each of which is a material term in the formation of a contract in this case.

4. The Agreement to Alternative Dispute Resolution leaves material portions open to future agreements by providing, *inter alia*, that the parties shall agree upon three arbitrators and that the parties shall agree upon all rules that shall govern the arbitration.

5. At most, the Agreement to Alternative Dispute Resolution is an "agreement to agree" that is indefinite



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and depends on one or more future agreements. [citation omitted]

6. The Agreement to Alternative Dispute Resolution is not a binding contract and is not enforceable.

The trial court “[did] not address or rule upon any issues that pertain to plaintiffs’ alternative claims that the Agreement . . . is unenforceable due to procedural and substantive unconscionability,” or the issue of whether Ms. O’Neal’s loss of consortium claim would be subject to the Agreement if it were enforceable. Defendants gave timely written notice of appeal on 10 April 2012.

**II. Jurisdiction & Standard of Review**

[1] North Carolina law generally permits a party to appeal only from a *final* judgment of the superior court. *See Veazey v. Durham*, 231 N.C. 357, 361–63, 57 S.E.2d 377, 381–82 (1950). A final judgment is defined as “one which disposes of the cause as to all the parties, leaving nothing to be judicially determined between them in the trial court.” *Duval v. OM Hospitality, LLC*, 186 N.C. App. 390, 392, 651 S.E.2d 261, 263 (2007) (quoting *Veazey*, 231 N.C. at 361-62, 57 S.E.2d at 381). However, the North Carolina General Statutes additionally permit an aggrieved party in a civil proceeding to appeal “[f]rom any interlocutory order or judgment of a superior or district court which . . . [a]ffects a substantial right.” N.C. Gen. Stat. § 7A-27(d)(1) (2011).

Here, the trial court’s order is not a final disposition of this case; thus, it is interlocutory. *See Veazey*, 231 N.C. at 362, 57 S.E.2d at 381. However, our courts have held “that the denial of a motion to compel arbitration, although interlocutory, is nevertheless immediately appealable, as it affects a substantial right.” *See Barnhouse v. Am. Express Fin. Advisors, Inc.*, 151 N.C. App. 507, 508, 566 S.E.2d 130, 131 (2002). Therefore, we have jurisdiction to hear Defendants’ appeal.

A trial court’s determination that an action is subject to arbitration is a conclusion of law which we review *de novo*. *See Carter v. TD Ameritrade Holding Corp.*, \_\_\_ N.C. App. \_\_\_, \_\_\_, 721 S.E.2d 256, 260 (2012). “ ‘Under a *de novo* review, the court considers the matter anew and freely substitutes its own judgment’ for that of the lower tribunal.” *State v. Williams*, 362 N.C. 628, 632-33, 669 S.E.2d 290, 294 (2008) (quoting *In re Greens of Pine Glen, Ltd. P’ship*, 356 N.C. 642, 647, 576 S.E.2d 316, 319 (2003)).

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## III. Analysis

[2] Preliminarily, we note that the trial court made no determination in its order as to whether state or federal arbitration law governs administration of the Agreement. This Court has recently explained that it is incumbent upon a trial court when considering a motion to compel arbitration to “address whether the Federal Arbitration Act (‘FAA’) or the North Carolina Revised Uniform Arbitration Act [(‘NCRUAA’)] applies” to any agreement to arbitrate. *Cornelius v. Lipscomb*, \_\_\_ N.C. App. \_\_\_, \_\_\_, 734 S.E.2d 870, 872 (2012) (citing *Sillins v. Ness*, 164 N.C. App. 755, 757, 596 S.E.2d 874, 876 (2004) (noting that a determination as to whether the FAA applies “is critical because the FAA preempts conflicting state law”)).

Congress enacted the FAA, 9 U.S.C. § 1 et seq., “[t]o overcome judicial resistance to arbitration,” *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 443 (2006), and to declare “a national policy favoring arbitration of claims that parties contract to settle in that manner.” *Preston v. Ferrer*, 552 U.S. 346, 353 (2008) (quotation marks and citation omitted). The FAA “is enforceable in both state and federal courts,” *Perry v. Thomas*, 482 U.S. 483, 489 (1987), and “will apply if the contract evidences a transaction involving interstate commerce.” *Hobbs Staffing Servs., Inc. v. Lumbermens Mut. Cas. Co.*, 168 N.C. App. 223, 226, 606 S.E.2d 708, 711 (2005); see also *Allied-Bruce Terminix Co. v. Dobson*, 513 U.S. 265, 273-81 (1995) (discussing factors to consider in determining whether an agreement “involves interstate commerce”). If the FAA is applicable, courts must apply it, even in the face of contractual provisions calling for the application of state law. See *Burke Cty. Bd. of Educ. v. Shaver P’ship*, 303 N.C. 408, 424, 279 S.E.2d 816, 825 (1981) (“We conclude . . . the choice of law provision in the contract does not preclude application of the Federal Arbitration Act.”).

“Whether a contract evidenced a transaction involving commerce within the meaning of the [FAA] is a question of fact” for the trial court. *Eddings v. S. Orthopaedic & Musculoskeletal Assocs.*, 167 N.C. App. 469, 474, 605 S.E.2d 680, 683 (2004) (quotation marks and citation omitted) (alteration in original). Accordingly, this Court typically “cannot make th[e] determination [as to what law applies] in the first instance on appeal; it is a question to be decided by the trial court.” *Cornelius*, \_\_\_ N.C. App. at \_\_\_, 734 S.E.2d at 872.

In the instant case however, it is clear that the FAA governs the parties’ agreement, for even if we apply state law, the parties’ choice

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of law is controlling. Our courts have long recognized that “ ‘[t]he parties’ choice of law is generally binding on the interpreting court as long as they had a reasonable basis for their choice and the law [chosen] does not violate a fundamental public policy of the state or otherwise applicable law.’ ” *Torres v. McClain*, 140 N.C. App. 238, 241, 535 S.E.2d 623, 625 (2000) (quoting *Behr v. Behr*, 46 N.C. App. 694, 696, 266 S.E.2d 393, 395 (1980)) (first alteration in original). Although our courts have recognized that choice of law provisions seeking to avoid application of the FAA are invalid, *See Burke Cty. Bd. of Educ.*, 303 N.C. at 424, 279 S.E.2d at 825, we can find no case holding that parties may not affirmatively choose the FAA to govern an agreement to arbitrate.

It is clear then that the provisions of the FAA apply in any event, as per the unambiguous language of the Agreement, which reads:

In accordance with the terms of the Federal Arbitration Act, 9 USC 1-16, I agree that any dispute arising out of or related to the provision of health care services . . . shall be subject to final and binding resolution through private arbitration.

This language clearly suggests that the parties intended the FAA to govern administration of the Agreement. Accordingly, to the extent the parties have entered into a valid agreement to arbitrate, federal law and the provisions of the FAA will govern.

**A. Indefiniteness***1. Identity of Arbitrators*

**[3]** Defendants argue on appeal that the trial court erred in concluding the Agreement between the parties was too indefinite to be enforced. We agree.

As a general matter, the public policy of our State favors arbitration. *See, e.g., Johnston Cty. v. R.N. Rouse & Co.*, 331 N.C. 88, 91, 414 S.E.2d 30, 32 (1992) (noting North Carolina’s “strong public policy” in favor of resolving disputes by arbitration). That being said, “this public policy does not come into play unless a court first finds that the parties entered into an enforceable agreement to arbitrate.” *Evangelistic Outreach Ctr. v. Gen. Steel Corp.*, 181 N.C. App. 723, 726, 640 S.E.2d 840, 843 (2007) (quotation marks and citation omitted). “The law of contracts governs the issue of whether there exists an agreement to arbitrate.” *Routh v. Snap-On Tools Corp.*, 108 N.C.

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App. 268, 271, 423 S.E.2d 791, 794 (1992).<sup>1</sup> Accordingly, the party seeking to compel arbitration must demonstrate that the parties “mutually agreed to arbitrate their disputes.” *Id.* at 271-72, 423 S.E.2d at 794.

In the instant case, there was clearly an offer to arbitrate any dispute which arose out of Defendants’ provision of medical care, as well as an acceptance of that offer by Mr. King. This Court has established that mutual promises to submit a dispute to arbitration constitute adequate consideration. *Martin v. Vance*, 133 N.C. App. 116, 122, 514 S.E.2d 306, 310 (1999). Nevertheless Plaintiffs argue, and the trial court concluded, that the Agreement is too indefinite to be enforced, because it “leaves material portions open to future agreements by providing, *inter alia*, [1] that the parties shall agree upon three arbitrators and [2] that the parties shall agree upon all rules that shall govern the arbitration.”

This conclusion, however, ignores the provisions of the FAA, which the parties have agreed would govern any arbitration. The FAA contemplates situations where parties are unable to agree on a slate of arbitrators, as is the case here:

If in the agreement provision be made for a method of naming or appointing an arbitrator or arbitrators or an umpire, such method shall be followed; *but . . . if a method be provided and any party thereto shall fail to avail himself of such method, or if for any other reason there shall be a lapse in the naming of an arbitrator or arbitrators or umpire, or in filling a vacancy, then upon the application of either party to the controversy the court shall designate and appoint an arbitrator or arbitrators or umpire, as the case may require, who shall act under the said agreement with the same force and effect as if he or they had been specifically named therein; and unless otherwise provided in the agreement the arbitration shall be by a single arbitrator.*

9 U.S.C. § 5 (2011) (emphasis added). Thus, the FAA provides the trial court authority to appoint a panel of arbitrators if the parties cannot

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1. This is the case regardless of venue. *See* 1 Martin Domke, *Domke on Commercial Arbitration* § 8:9 (3d ed. 2012) (“A federal court should look to the state law that ordinarily governs the formation of contracts to determine whether a valid agreement to arbitrate arose between the parties.”).

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come to an agreement. Accordingly, the failure of the parties to agree on a panel of arbitrators does not render the Agreement indefinite.<sup>2</sup>

**2. Procedures**

Plaintiffs note that the FAA does not provide a similar provision discussing the *procedure* by which an arbitration is to be conducted in light of the parties' inability to agree on a procedure.<sup>3</sup> However, arbitrators are typically given wide discretion in determining the procedures under which the arbitration will be conducted. The United States Supreme Court has observed that "when the subject matter of a dispute is arbitrable, 'procedural' questions which grow out of the dispute and bear on its final disposition are to be left to the arbitrator." *United Paperworkers Int'l Union v. Misco, Inc.*, 484 U.S. 29, 40 (1987) (citing *John Wiley & Sons, Inc. v. Livingston*, 376 U.S. 543, 557 (1964)). Therefore, the arbitrators may establish procedures to the extent the parties cannot agree.

Thus, we reject Plaintiffs' argument that the Agreement is insufficiently definite to be enforced. Accordingly, we reverse the trial court's order concluding otherwise.

**B. Unconscionability and Non-Signatory Issues**

[4] The trial court's order did not address Plaintiffs' other two arguments: (1) that the Agreement is unconscionable and (2) that the Agreement is inapplicable to Ms. O'Neal's loss of consortium claim. Both parties have requested that we address these issues on appeal. However, the trial court has not yet ruled on these questions, and we decline to address them in the absence of the trial court having made findings of fact supporting a ruling. For the benefit of the parties and the trial court, we will briefly discuss the law the trial court should apply on remand.

As a threshold matter, we note that under the facts of this case, where Plaintiffs challenge the validity of the precise arbitration agreement at issue, and not their broader agreement regarding the provision of medical services, federal law dictates that the trial court

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2. We note that even if the Agreement was governed by state law, a similar provision exists in the NCRUAA. See N.C. Gen. Stat. § 1-569.11(a) (2011) ("If . . . the agreed method fails . . . the court, on motion of a party to the arbitration proceeding, shall appoint the arbitrator.").

3. The Agreement states that the parties "may be guided by the Health Care Claim Settlement Procedures of the American Arbitration Association," but imposes no affirmative duty on them to agree to use those procedures.

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is the appropriate body to determine whether the agreement is unconscionable. *See Rent-A-Center, West, Inc. v. Jackson*, \_\_\_ U.S. \_\_\_, \_\_\_, 130 S. Ct. 2772, 2778–79 (2010). Furthermore, “state law generally governs issues concerning the validity, revocability, and enforcement of arbitration agreements.” *Ragan v. Wheat First Sec., Inc.*, 138 N.C. App. 453, 456, 531 S.E.2d 874, 877 (2000) (citing *Doctor’s Assoc., Inc. v. Casarotto*, 517 U.S. 681 (1996) (holding that generally applicable contract defenses, such as fraud, duress or unconscionability, may be applied to invalidate arbitration agreements without contravening the FAA)). Accordingly, the trial court should apply North Carolina’s law of unconscionability on remand, a recent summary of which may be found in *Tillman v. Comm. Credit Loans, Inc.*, 362 N.C. 93, 655 S.E.2d 362 (2008).<sup>4</sup>

We also note that any unconscionability analysis in this case must be undertaken with an understanding of the unique nature of the physician/patient relationship. As the authoritative treatise on commercial arbitration notes:

While nearly every court to consider the issue has concluded that medical malpractice claims can properly be submitted to arbitration, issues have been raised as to patients’ understanding of arbitration contracts and the potentially coercive circumstances under which the agreements are made. The use of arbitration clauses in contracts for healthcare services is distinct from their use in settling labor or commercial disputes because the legal relationship between provider and patient is determined by both private contract law and public tort law. There is tension between contract law, the principles of which have been applied to binding arbitration clauses in labor, and commercial agreements for years and the application of tort law to enforce conformity with standards of care desired by society, particularly standards of professional care.

1 Martin Domke, *Domke on Commercial Arbitration* § 16:16 (3d ed. 2012).

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4. North Carolina law should also be applied by the trial court in resolving whether Ms. O’Neal is bound by any agreement to arbitrate. *See* 1 Martin Domke, *Domke on Commercial Arbitration* § 13:1 n.3 (3d ed. 2012) (“State law contract principles will be applied in determining whether a nonsignatory to an agreement is properly considered a party to arbitration under the [FAA].” (citing *Int’l Paper Co. v. Schwabedissen Maschinen & Anlagen GMBH*, 206 F.3d 411 (4th Cir. 2000))).

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These considerations are particularly important given the fact that the physician/patient relationship is a fiduciary one. *See Watts v. Cumberland Cty. Hosp. Sys., Inc.*, 317 N.C. 110, 116, 343 S.E.2d 879, 884 (1986) (recognizing “that the relationship of patient and physician is considered to be a fiduciary one, imposing upon the physician the duty of good faith and fair dealing” (quotation marks and citation omitted)). Inherent in any fiduciary relationship is an affirmative duty “to disclose all facts material to a transaction.” *Jacobs v. Physicians Weight Loss Center of Am., Inc.*, 173 N.C. App. 663, 668, 620 S.E.2d 232, 236 (2005).

Under North Carolina law, fiduciary relationships create a rebuttable presumption that the plaintiff put his trust and confidence in the defendant as a matter of law. Once a presumptive fiduciary relationship is alleged, it is the *defendant* who bears the burden of showing he or she “act[ed] openly, fairly and honestly in bringing about [the transaction].” N.C.P.I.—Civ. 800.06 (2011); *see also Collier v. Bryant*, \_\_\_ N.C. App. \_\_\_, \_\_\_, 719 S.E.2d 70, 81 (2012) (“After the plaintiff has established a *prima facie* case of the existence of a fiduciary duty, and its breach, the burden shifts to the defendant to prove he acted in an open, fair and honest manner, so that no breach of fiduciary duty occurred.” (citation and quotation marks omitted)). “This means that the defendant must prove, by the greater weight of the evidence, that, with regard to [the transaction], the defendant made a full, open disclosure of material facts, that *he* dealt with the plaintiff fairly, without oppression, imposition or fraud, and that *he* acted honestly.” N.C.P.I.—Civ. 800.06 (2011). The trial court should be mindful of this burden shifting framework in evaluating Plaintiffs’ argument that the Agreement is unconscionable.

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The North Carolina Constitution provides a “sacred and inviolable” right to a jury trial “[i]n all controversies at law respecting property, [as] the ancient mode of trial by jury is one of the best securities of the rights of the people.” N.C. Const. art. I, § 25; *see also Rhyne v. K-Mart Corp.*, 358 N.C. 160, 176, 594 S.E.2d 1, 12 (2004) (“Without question, vested rights of action are property, just as tangible things are property. A right to sue for *an injury* is a right of action; it is a thing in action, and is property.” (citations and quotation marks omitted)). Of course, individuals may waive their right to a civil jury trial by agreement. However, any waiver must be examined cautiously, especially in situations in which a fiduciary relationship is present, as is the case here.

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**IV. Conclusion**

For the foregoing reasons, we reverse the order of the trial court denying Defendants' Motion to Enforce Arbitration Agreement and remand for proceedings consistent with this opinion.

REVERSED AND REMANDED.

Judges BRYANT and STROUD concur.

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WARREN MCGEE LUDLAM, PLAINTIFF-APPELLEE  
v.  
LESLIE KNOX MILLER, DEFENDANT-APPELLANT

No. COA12-637

Filed 5 February 2013

**1. Child Custody and Support—imputation of income—insufficient findings of fact**

The trial court failed to make sufficient findings of fact in a child support modification case to support its conclusion to impute minimum wage to both unemployed parties. The matter was remanded for further findings of fact to support its conclusions of law and rulings.

**2. Child Custody and Support—child support calculation—inheritance not factored in**

The trial court did not abuse its discretion in a child support modification case by deciding not to factor plaintiff's inheritance into its child support calculations.

**3. Child Custody and Support—child support modification—self-support reserve category**

The trial court did not err in a child support modification case by finding that the matter fell into the self-support reserve category for child support.

**4. Child Custody and Support—cost of insurance—provided through stepparent—insufficient findings of fact**

The trial court erred in a child support modification case by assigning the cost of health and dental insurance to defendant



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without making specific findings of fact regarding the availability of reasonably priced health and dental insurance. Insurance provided through defendant's husband could be considered as reasonably priced insurance coverage available to defendant. The matter was remanded for further findings of fact.

**5. Child Custody and Support—child support modification—cost of insurance—self-support reserve category**

The trial court did not err in a child support modification case by ordering defendant to pay all of the health and dental insurance premiums for the children where the trial court did not err in determining that plaintiff fell within the self-support reserve category.

**6. Child Custody and Support—child support modification—documentation of insurance—insufficient findings of fact**

The trial court's order in a child support modification case was remanded for further findings of fact concerning what documentation was required for plaintiff to have access to the health and dental insurance provided by defendant for the children's benefit.

**7. Child Custody and Support—child support modification—cost of private school—not obligated**

The trial court did not err in a child support modification case by determining that plaintiff was not obligated to contribute to the costs of sending the children to private school as this determination was within the trial court's discretion.

**8. Child Custody and Support—child support modification—child support worksheet—not attached to order—no prejudice**

The trial court did not commit prejudicial error in a child support modification case by failing to attach to the order a child support worksheet referenced in the order. Defendant included the relevant worksheet in the record and the Court's review of the order was not prejudiced.

**9. Child Custody and Support—child support agreement—termination**

The trial court did not err in a child support modification case by determining that the 7 June 2006 agreement had expired by its own terms and no longer contained any enforceable provisions. The execution of the 21 January 2010 agreement served to

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terminate the 7 June 2006 agreement. Further, defendant did not indicate how she was prejudiced by the alleged retroactive termination of the child support agreement.

**10. Child Custody and Support—child support modification—breach of support agreement—insufficient findings of fact**

The trial court erred in a child support modification case by failing to include any findings of fact and conclusions of law concerning alleged breaches of a 7 June 2006 child support agreement prior to 21 January 2010. The matter was remanded.

**11. Child Custody and Support—child support modification—distribution of inheritance—insufficient findings of fact**

The trial court's order in a child support modification case was remanded for further findings of fact concerning the distribution of certain items of plaintiff's inheritance.

**12. Child Custody and Support—child support modification—sanctions—attorney fees—no abuse of discretion**

The trial court did not abuse its discretion in a child support modification case by failing to order sanctions against plaintiff, and by failing to award attorney's fees to defendant. The trial court gave the issues of attorney's fees and sanctions appropriate consideration, as reflected in its findings.

Appeal by Defendant from order entered 31 October 2011 by Judge Susan E. Bray in District Court, Guilford County. Heard in the Court of Appeals 11 December 2012.

*Jonathan McGirt; and Sandlin & Davidian, PA, by Deborah Sandlin, for Plaintiff-Appellee.*

*Woodruff Law Firm, PA, by Carolyn J. Woodruff and Jessica S. Bullock, for Defendant-Appellant.*

McGEE, Judge.

Warren McGee Ludlam (Plaintiff) and Leslie Knox Miller (Defendant) were married in 1992, and separated on 12 June 2006. There were two children (the children) born of this marriage, both still minors at the time of this appeal. Plaintiff and Defendant entered into a Consent Child Support and Parenting Agreement on 7 June 2006 (the 7 June 2006 agreement). According to the 7 June 2006 agreement, Plaintiff agreed to "transfer a minimum of fifteen (15) percent

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of any inheritance or trust distribution that he receives by reason of the deaths of [Plaintiff's relatives] Helen Ludlam and Martha Ludlam to be held in trust for the benefit of [the children]." The 7 June 2006 agreement further stated that Plaintiff "shall set up a trust account for the children no later than December 31, 2006, and the children's portion of any distribution . . . will be deposited into the children's trust accounts within ten (10) days of [Plaintiff's] receipt." Plaintiff did not set up a trust account for the children by 31 December 2006. Plaintiff apparently set up a single trust account for the children in 2007, but this trust account was never funded.

Helen Ludlam, Plaintiff's mother, died 20 December 2008. According to Defendant, Plaintiff "inherited \$368,487.26" from his mother's estate. Defendant does not indicate whether that \$368,487.26 consisted of only cash, or whether it also included furniture, jewelry, and "oil and gas trusts" that Defendant claims Plaintiff inherited. A partial cash distribution of \$325,953.94 from Helen Ludlam's estate was distributed to Plaintiff by attorneys for the executors of Helen Ludlam's estate. Plaintiff had set up individual trust accounts for the children on or about 23 December 2009. From the partial cash distribution of \$325,953.94, Plaintiff received \$277,060.84, and fifteen percent of it or \$48,893.10 was deposited into the children's trust accounts by 5 January 2010, as required by the 7 June 2006 agreement. Plaintiff also inherited personal property, including jewelry and furniture, from his mother. According to a 23 December 2009 letter sent to the children's trustee, Plaintiff set aside fifteen percent of the personal property inheritance for the children. There appears to be a dispute concerning whether this personal property was transferred to the children. An email from Plaintiff to Barbara Shyloski (Shyloski) at UBS Bank (UBS), dated 30 October 2009, indicates that Plaintiff received a total cash inheritance of \$368,487.26, and that he intended to deposit \$27,636.55 into each child's account. This amount represents a total of \$55,273.09 to the children, and is fifteen percent of \$368,487.26. Shyloski was Plaintiff's financial advisor. She was also a friend of both Plaintiff and Defendant. Shyloski testified that she advised Plaintiff to establish the children's 2009 separate trust accounts, believing that was preferable to utilizing a single trust account for both children. Shyloski set up the children's 2009 trust accounts at UBS. The trial court's findings of fact do not state what Plaintiff inherited from his mother, or how much of this inheritance was transferred into the children's trust accounts.

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Additionally, in the 7 June 2006 agreement, Plaintiff and Defendant agreed that Plaintiff would pay \$1,000.00 in monthly child support, and that Plaintiff and Defendant would evenly split the costs of health care, private schooling, and other expenses. The 7 June 2006 agreement stated it would remain in effect until: “(1) a custody order is entered by a court of competent jurisdiction or (2) the parties enter another child support, custody or parenting agreement executed in writing with the same formality as this Agreement.” Plaintiff and Defendant entered into a Custody Consent Agreement on 21 January 2010 (the 21 January 2010 agreement), giving primary physical custody of the children to Defendant and secondary physical custody to Plaintiff.

Plaintiff and Defendant were divorced sometime after entry of the 7 June 2006 agreement. Defendant later married David Miller, a major in the armed forces (Major Miller). Plaintiff lost his job in 2008, and he has been unable to find employment since that time. Defendant has also been unemployed since 2008. The trial court found that both Plaintiff and Defendant had “searched for employment but have not been able to secure employment.”

We must note that throughout Defendant’s brief, her appellate attorneys consistently refer to Plaintiff as “a chronically unemployed MBA,” and we find this language argumentative, and in violation of Rule 28(b)(5) of our Rules of Appellate Procedure. We note that Defendant, at the time of appeal, had been unemployed at least as long as Plaintiff, and had, according to testimony, been earning more than Plaintiff at the end of their marriage. In addition, Defendant also has an MBA, is a Certified Financial Advisor, and has passed the test to become a Certified Financial Planner.

Plaintiff filed this action on 2 February 2010, asking the trial court to “enter a child support order based upon the North Carolina Child Support Guidelines.” Defendant answered on 12 April 2010, and filed counterclaims for breach of contract, child support, and attorney’s fees. This matter was heard during the 11 April 2011 and subsequent Civil Sessions of District Court for Guilford County.

Defendant filed a motion for sanctions and criminal contempt against Plaintiff on 20 June 2011. In that motion, Defendant alleged that Plaintiff had made false representations both in his deposition and at the hearing, and had failed to fully comply with discovery. An order was entered on 31 October 2011 (the order) in which the trial court ruled that: (1) the 21 January 2010 agreement served to termi-

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nate the 7 June 2006 agreement; (2) Plaintiff was to pay monthly child support in the amount of \$156.00; (3) Defendant was to maintain health and dental insurance for the children, including paying the premiums, but Plaintiff and Defendant would equally share all uncovered or un-reimbursed medical and dental costs; (4) Defendant would provide Plaintiff with all necessary health and dental insurance coverage documentation; (5) Plaintiff owed no retroactive child support, and no amount was owed by either party for any expenses previously incurred on behalf of the children; (6) neither Plaintiff nor Defendant was entitled to attorney's fees or costs; and (7) Defendant's motion for sanctions and contempt was denied. Defendant appeals.

## I.

Defendant raises on appeal thirteen issues related to the order. We affirm in part and reverse and remand in part.

## II.

This Court has stated the standard of review applicable to child support orders as follows:

In reviewing child support orders, our review is limited to a determination whether the trial court abused its discretion. Under this standard of review, the trial court's ruling will be overturned only upon a showing that it was so arbitrary that it could not have been the result of a reasoned decision. The trial court must, however, make sufficient findings of fact and conclusions of law to allow the reviewing court to determine whether a judgment, and the legal conclusions that underlie it, represent a correct application of the law.

*Spicer v. Spicer*, 168 N.C. App. 283, 287, 607 S.E.2d 678, 682 (2005) (citations omitted).

Child support is to be set in such amount "as to meet the reasonable needs of the child for health, education, and maintenance, having due regard to the estates, earnings, conditions, accustomed standard of living of the child and the parties, the child care and the homemaker contributions of each party, and other facts of the particular case." N.C. Gen. Stat. § 50-13.4(c) (2009). Trial courts have great discretion in establishing the amount of support to be provided minor children. The amount

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of child support awarded will therefore not be disturbed upon appeal absent a showing of abuse of discretion. Furthermore, an amount of child support which falls within the “guidelines is presumptively correct.” “The ‘ultimate objective in setting awards for child support is to secure support commensurate with the needs of the children and the ability of the [obligor] to meet the needs.’ ”

*Robinson v. Robinson*, \_\_ N.C. App. \_\_, \_\_, 707 S.E.2d 785, 795 (2011) (citations omitted).

“When determining a child support award, a trial judge has a high level of discretion, not only in setting the amount of the award, but also in establishing an appropriate remedy.” “Child support orders entered by a trial court are accorded substantial deference by appellate courts and our review is limited to a determination of whether there was a clear abuse of discretion.”

[A]bsent a clear abuse of discretion, a judge’s determination of what is a proper amount of child support will not be disturbed on appeal. . . . A judge is subject to reversal for abuse of discretion only upon a showing by the litigant that the challenged actions are manifestly unsupported by reason.

*Moore v. Onafowora*, 208 N.C. App. 674, 676-77, 703 S.E.2d 744, 746-47 (2010) (citations omitted).

**III.**

[1] In Defendant’s first argument, she contends the trial court erred by imputing minimum wage to her and Plaintiff when it found that neither Plaintiff nor Defendant acted in bad faith or suppressed his or her respective income to avoid or lessen child support obligations. We hold that the trial court’s findings of fact are insufficient to support its conclusions of law on this issue, and we remand for further action.

The trial court determines the amount of child support based upon guidelines created pursuant to N.C. Gen. Stat. § 50-13.4(c)-(c1) (2011). The North Carolina Child Support Guidelines in effect on 1 January 2011 (the guidelines) state in relevant part:

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**Assumptions And Expenses Included In Schedule Of Basic Child Support Obligations**

. . . .

**(3) Potential or Imputed Income.** If the court finds that a parent's voluntary unemployment or underemployment is the result of the parent's bad faith or deliberate suppression of income to avoid or minimize his or her child support obligation, child support may be calculated based on the parent's potential, rather than actual, income. . . . .

The amount of potential income imputed to a parent must be based on the parent's employment potential and probable earnings level based on the parent's recent work history, occupational qualifications and prevailing job opportunities and earning levels in the community. If the parent has no recent work history or vocational training, potential income should not be less than the minimum hourly wage for a 40-hour work week.

N.C. Child Support Guidelines, 2012 Ann. R. N.C. 50-51. For the purposes of this appeal, because the guidelines do not have clearly delineated sections, we shall refer to the above section of the guidelines as "section three." Concerning section three, this Court has held:

"[B]efore the earnings capacity rule is imposed, it must be shown that [the party's] actions which reduced his income were not taken in good faith." Thus, where the trial court finds that the decrease in a party's income is substantial and involuntary, without a showing of deliberate depression of income or other bad faith, the trial court is without power to impute income, and must determine the party's child support obligation based on the party's actual income.

*Ellis v. Ellis*, 126 N.C. App. 362, 364-65, 485 S.E.2d 82, 83 (1997) (citations omitted).

In finding of fact (12), the trial court stated:

Both Parties have searched for employment but have not been able to secure employment. The Court does not find that either party has acted in bad faith in having been voluntarily unemployed or that either party has

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[deliberately] suppressed his or her income to avoid a support obligation to the extent that the Court should impute income to each party at a prior income level; however, the Court finds it appropriate to impute income to each party at the minimum wage of \$7.25 per hour (at 40 hours per week and 50 weeks per year, given holidays), for an imputed income to each party of \$1,208.00 per month for the purposes of calculating child support.

The trial court found that both Plaintiff and Defendant had searched for employment, but both had been unsuccessful. Less clear from the order is whether the trial court found that Plaintiff and Defendant had acted in bad faith. Our general impression is that the trial court found no bad faith. However, a literal reading of this finding of fact suggests that the trial court found bad faith which was insufficient to impute income at a prior income level, but that it found bad faith that was sufficient to impute income at the minimum wage. Neither of the above interpretations of the trial court's order would support imputation of income at minimum wage.

The trial court must find a "deliberate depression of income or other bad faith" in order to impute income. *Ellis*, 126 N.C. App. at 364-65, 485 S.E.2d at 83. Further, the guidelines do not authorize choosing a method of imputing income based upon the *degree* of bad faith found by the trial court. Therefore, to the extent, if any, that the trial court imputed income at minimum wage because it found a low degree of bad faith, but would have imputed income based on prior earnings had it found a higher degree of bad faith, this was error. Pursuant to section three, the trial court is to first determine whether "deliberate depression of income or other bad faith" exists. If the trial court finds either in the affirmative, it may then determine the method of imputing income:

The amount of potential income imputed to a parent must be based on the parent's employment potential and probable earnings level based on the parent's recent work history, occupational qualifications and prevailing job opportunities and earning levels in the community. If the parent has no recent work history or vocational training, potential income should not be less than the minimum hourly wage for a 40-hour work week.



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N.C. Child Support Guidelines, 2012 Ann. R. N.C. 51. We are aware that the guidelines permit deviation from the guidelines in certain circumstances. *Beamer v. Beamer*, 169 N.C. App. 594, 597, 610 S.E.2d 220, 223 (2005). The order, however, does not contain the findings of fact or conclusions of law required for deviation from the guidelines, *id.*, so there is no indication the trial court was intending any deviation in this instance.

We reverse this portion of the order and remand to the trial court. If the trial court concludes there has been deliberate depression of income or other bad faith, it may then impute income in accordance with section three. If the trial court concludes there was no deliberate depression of income or other bad faith, it may not impute income based upon section three. This is not to say that the trial court may not deviate from the guidelines under the appropriate circumstances. *Beamer*, 169 N.C. App. at 596-97, 610 S.E.2d at 222-23. The trial court shall make all necessary findings of fact to support its conclusions of law and rulings.

## IV.

**[2]** In Defendant's second argument, she contends the trial court erred in failing to consider Plaintiff's "non-recurring income." We disagree.

Specifically, Defendant argues that Plaintiff received \$368,487.26 through inheritance that should have been treated as non-recurring income and should have been factored into the trial court's child support calculations. Defendant cites the guidelines, which state:

"Income" means a parent's actual gross income from any source, including but not limited to income from employment or self-employment (salaries, wages, commissions, bonuses, dividends, severance pay, etc.) . . . . When income is received on an irregular, non-recurring, or one-time basis, the court *may* average or pro-rate the income over a specified period of time or require an obligor to pay as child support a percentage of his or her non-recurring income that is equivalent to the percentage of his or her recurring income paid for child support.

N.C. Child Support Guidelines, 2012 Ann. R. N.C. 51 (emphasis added). Nothing in the guidelines suggests a trial court is required to include non-recurring income in its child support calculations, and Defendant cites to nothing indicating otherwise. In fact, the trial court is vested with great discretion in these matters:

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The General Assembly has chosen to give the district courts broad discretion to devise an appropriate child support award in light of the circumstances of all the parties. It is the responsibility of the district court to weigh those circumstances and determine what is just and appropriate; we may not dictate a result as a matter of law.

*Spicer*, 168 N.C. App. at 290-91, 607 S.E.2d at 684.

There is evidence in the record that, in accordance with the terms of the 7 June 2006 agreement, Plaintiff transferred fifteen percent of the \$368,487.26 inheritance, or \$55,273.09, to two trust accounts established for the children. The trial court found as fact that, at the time of the hearing, Plaintiff had a net worth of \$301,136.98 and Defendant had a net worth of \$378,740.00-\$77,603.02 more than Plaintiff. We hold the trial court did not abuse its discretion in deciding not to factor the remainder of Plaintiff's \$368,487.26 inheritance into its child support calculations. *Id.*

## V.

**[3]** In Defendant's third argument, she contends the trial court erred by finding that this matter "fell into the self-support reserve category for child support." We disagree.

"The Guidelines include a self-support reserve that ensures that obligors have sufficient income to maintain a minimum standard of living[.]" N.C. Child Support Guidelines, 2012 Ann. R. N.C. 50. Child support obligors who fall into the self-support reserve category have reduced obligations under the guidelines. *Id.*

Defendant's argument is wholly premised upon her previous argument that the trial court erred by failing to factor Plaintiff's \$368,487.26 inheritance into its child support calculations. Because we have held that the trial court did not err in so doing, we necessarily hold that this argument is also without merit.

## VI.

**[4]** In Defendant's fourth argument, she contends the trial court erred "by assigning the cost of health and dental insurance to [Defendant] . . . without first finding that she could procure insurance currently at a reasonable cost." We agree in part, and remand for additional findings of fact.

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The trial court found as fact that “Defendant provides medical and dental insurance coverage to the . . . minor children at a cost of \$60.00 per month.” The trial court then ordered that “Defendant shall provide . . . and pay any insurance premiums for health and dental insurance coverage for the minor children[.]” Defendant argues the trial court erred in failing to make required findings of fact, and also erred in ordering that Defendant maintain the current health insurance coverage that was provided through Major Miller’s employer. We agree that the trial court must make specific findings of fact regarding the availability of reasonably priced health and dental insurance. *Buncombe Cty. ex rel. Frady v. Rogers*, 148 N.C. App. 401, 403-04, 559 S.E.2d 227, 229 (2002). We find that the child support order does not include sufficient findings of fact in this regard, and remand to the trial court for further action.

Defendant’s second contention, however, is without merit. The trial court ordered Defendant to continue providing health and dental insurance coverage, which the trial court found was costing Defendant sixty dollars per month. Defendant argues that this insurance is provided through Major Miller’s employer and, thus, cannot be considered as reasonably priced insurance coverage available to Defendant. Assuming the health and dental insurance coverage currently maintained for the children is provided through Major Miller’s employer, which will be made clear through additional findings of fact by the trial court, the guidelines clearly anticipate that insurance may be provided through a stepparent:

**Health Insurance and Health Care Costs**

The amount that is, or will be, paid by a parent (or a parent’s spouse) for health (medical, or medical and dental) insurance for the children for whom support is being determined is added to the basic child support obligation and prorated between the parents based on their respective incomes. Payments that are made by a parent’s (or stepparent’s) employer for health insurance and are not deducted from the parent’s (or stepparent’s) wages are not included.

N.C. Child Support Guidelines, 2012 Ann. R. N.C. 53. This part of Defendant’s argument is without merit.

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## VII.

**[5]** In Defendant's fifth argument, she contends the trial court erred by ordering her to pay all of the health and dental insurance premiums for the children. We disagree.

Defendant's entire argument is premised upon her previous argument that Plaintiff did not fall within the self-support reserve category. Because we have held above that the trial court did not err in determining that Plaintiff falls within the self-support reserve category, we further hold that Defendant's fifth argument fails.

## VIII.

**[6]** In Defendant's sixth argument, she contends the trial court erred in "ordering [her] to provide health and dental coverage and to immediately supply [Plaintiff] with copies of insurance and ID cards." We remand for further findings.

Defendant reargues her position that Major Miller cannot be required to provide health and dental insurance for Defendant's children. We have already stated that the guidelines contemplate that insurance for children may be provided by a stepparent, and we have remanded for additional findings regarding the coverage currently provided to the children. We note that the trial court ordered Defendant, not Major Miller, to continue providing insurance. Though Defendant may have procured that insurance through Major Miller, it is Defendant, not Major Miller, who is legally responsible for paying the premiums. If the trial court makes the appropriate findings of fact, there is no inherent error in having Defendant pay for insurance premiums for coverage provided through her husband's employer.

Defendant claims the insurance that is currently provided for the children is provided through Major Miller's military insurance, and that ordering Major Miller to turn over documentation to Plaintiff to use for the children would violate 18 U.S.C.S. § 701 (1994). Because the record does not indicate what documentation is required for Plaintiff to have access to the health and dental insurance provided by Defendant for the children's benefit, we remand for findings of fact to resolve this issue. We are confident proper insurance cards or other documentation that will not violate federal law are available for Plaintiff to use for the benefit of the children.

Defendant also seems to argue that Major Miller, because of his dislike for Plaintiff, will terminate insurance coverage for the chil-

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dren and force Defendant to obtain other, more expensive insurance. Defendant argues that, because the trial court has no authority to order Major Miller to allow Defendant to use Major Miller's insurance for the children, the trial court has failed to show that Defendant may obtain and maintain insurance for the children at a reasonable cost. Because the findings of fact are insufficient even to establish that the insurance has been provided through Major Miller, we remand for appropriate findings. Assuming, *arguendo*, that Defendant's argument is correct, and that Major Miller will deprive Defendant of what appears to be a most affordable health and dental insurance for the children, Defendant may, at that time, argue a change of circumstances to the trial court and seek appropriate relief. N.C. Gen. Stat. § 50-13.7(a) (2011). Unless and until that happens, however, the trial court commits no error in ordering Defendant to continue paying premiums for the insurance currently benefitting the children.

We remand for additional findings of fact and conclusions of law, as needed, to address the above issues.

## IX.

[7] In Defendant's seventh argument, she contends the trial court erred in determining that Plaintiff was not obligated to contribute to the costs of sending the children to private school. We disagree.

Pursuant to the guidelines, in a section titled **Other Extraordinary Expenses**:

[E]xpenses related to special or private elementary or secondary schools to meet a child's particular educational needs . . . may be added to the basic child support obligation and ordered paid by the parents in proportion to their respective incomes if the court determines the expenses are reasonable, necessary, and in the child's best interest.

N.C. Child Support Guidelines, 2012 Ann. R. N.C. 53.

The trial court stated the following in its fifteenth finding of fact:

The private school costs are not a factor in calculating child support, and the Court does not determine that the expenses for private school are reasonable, necessary and in the children's best interest. Nevertheless, the minor children have been enrolled in private school for years (at least since the execution of the [consent agree-

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ment]), it was the parties' prior agreement for the minor children to attend private school and for each party to pay one-half of the private school expenses, the parties believe that it is good and beneficial for the minor children to attend private school and both parties want the minor children to attend private school, so the Court would . . . normally be inclined to deviate from the Child Support Guidelines if appropriate (after making proper findings of fact) and order Plaintiff to pay one-half of the private school costs for the minor children; however, Plaintiff does not have the income to pay part of the private school costs, and the Court is also inclined to award Plaintiff some of his attorney fees to be reimbursed to him by Defendant given the circumstances of this case. In weighing the evidence, the Court does not find that a deviation is warranted regarding private school expenses, and the Court is also considering this finding in not awarding Plaintiff any attorney fees to be reimbursed by Defendant.

We note that this finding of fact includes conclusions of law, and we treat them as such. Defendant correctly argues that the trial court seemed to erroneously believe it would need to deviate from the guidelines to order Plaintiff to pay part of the costs for private school:

"[D]etermination of what constitutes an extraordinary expense is . . . within the discretion of the trial court[.]" Based upon the Guideline language above, "the court may, in its discretion, make adjustments [in the Guideline amounts] for extraordinary expenses." However, incorporation of such adjustments into a child support award does *not* constitute deviation from the Guidelines, but rather is deemed a discretionary adjustment to the presumptive amounts set forth in the Guidelines. . . . [A]bsent a party's request for deviation, the trial court is not required to set forth findings of fact related to the child's needs and the non-custodial parent's ability to pay extraordinary expenses.

*Biggs v. Greer*, 136 N.C. App. 294, 298, 524 S.E.2d 577, 581-82 (2000) (citations omitted). Though the trial court may have been mistaken concerning whether ordering Plaintiff to pay private school expenses would have been a deviation from the guidelines, or merely a discretionary determination, the intent and reasoning of the trial court is

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clear, and we find no abuse of discretion in its ruling. Defendant's argument is without merit.

## X.

**[8]** In Defendant's eighth argument, she contends the trial court committed prejudicial error in failing to attach to the order a child support worksheet referenced in the order. We disagree.

Specifically, Defendant argues that this Court does not have the necessary record evidence "to assess the [t]rial [c]ourt's findings of fact and conclusions of law related to the proper level of support for each parent." We first note that Defendant does not include in her brief citation to any authority in support of her argument. N.C.R. App. P. 28(b)(6) ("The body of the argument and the statement of applicable standard(s) of review shall contain citations of the authorities upon which the appellant relies."). Further, Defendant includes the relevant worksheet in the record. Our review of the order is in no way prejudiced. This argument is without merit.

## XI.

**[9]** In Defendant's ninth and tenth arguments, she contends the trial court erred in determining that the 7 June 2006 agreement had expired by its own terms and no longer contained any enforceable provisions. We disagree.

Contract interpretation is a question of law, and our review is *de novo*. *Harris v. Ray Johnson Constr. Co.*, 139 N.C. App. 827, 829, 534 S.E.2d 653, 654 (2000) (citations omitted).

The trial court concluded that, once Plaintiff and Defendant entered into the 21 January 2010 agreement, the 7 June 2006 agreement terminated by its own terms. The 7 June 2006 agreement states: "This Agreement shall remain in full force and effect until: (1) a custody order is entered by a court of competent jurisdiction or (2) the parties enter another child support, custody or parenting agreement executed in writing with the same formality as this Agreement." The parties entered into and executed another custody agreement, in writing, on 21 January 2010. The intent of the parties in an agreement is determined by consulting the plain language of the agreement. *Brown v. Ginn*, 181 N.C. App. 563, 567, 640 S.E.2d 787, 789-90 (2007). When the language of the agreement is unambiguous, we will not consult extrinsic evidence. *Id.* We hold that the execution of the 21 January 2010 agreement served to terminate the 7 June 2006 agreement.

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[225 N.C. App. 350 (2013)]

Further, the only specific prejudice argued by Defendant is as follows: “The result of the [t]rial [c]ourt’s ruling was to terminate an agreement for Child Support retroactively, leaving a period of more than a year where the parties were not governed by an agreement or Order to provide child support.” Defendant does not indicate how she was prejudiced by this alleged retroactive termination of the child support agreement. This argument is without merit.

**XII.**

**[10]** In her eleventh argument, Defendant contends the trial court erred “in not considering breaches of the agreement occurring before the court-declared termination date.” We remand for additional findings and conclusions as needed.

Defendant provides no citation in support of her argument that the trial court erred by failing to consider any breach of the 7 June 2006 agreement that may have occurred before that agreement terminated on 21 January 2010, which constitutes a violation of N.C.R. App. P. 28(b)(6), and subjects this argument to dismissal. Defendant does include one citation to support her argument that the trial court erred by failing to include any findings of fact and conclusions of law concerning alleged breaches of the 7 June 2006 agreement prior to 21 January 2010. Defendant argues that Plaintiff failed to fund the children’s trusts in a timely manner, resulting in a loss of interest income to the children. Because we have no findings of fact or conclusions of law to review concerning this allegation, we remand to the trial court so that it may make the required findings and conclusions. We note, however, that any damages resulting from Plaintiff’s failure to fund the children’s trust funds within the time period prescribed by the 7 June 2006 agreement are likely to be minimal. The 7 June 2006 agreement stated:

[Plaintiff] shall transfer a minimum of fifteen (15) percent of any inheritance or trust distribution that he receives by reason of the deaths of Helen Ludlam and Martha Ludlam to be held in trust for the benefit of the children[.] [Plaintiff] shall set up a trust account for the children no later than December 31, 2006, and the children’s portion of any distribution . . . will be deposited into the children’s trust accounts within ten (10) days of . . . receipt.

There is evidence to suggest that Helen Ludlam died 20 December 2008, and that her estate was settled by 8 December 2009. More pre-



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cise dates will be found by the trial court on remand. There is evidence that most, if not all, of the fifteen percent of the \$368,487.26 distribution was deposited into the children's trust accounts by 5 January 2010, apparently less than a month after Plaintiff received the funds, and around eighteen days past the time period mandated by the 7 June 2006 agreement. The trial court is the appropriate body to make findings of fact concerning the timing and amounts of the distributions to the children's trust accounts.

## XIII.

**[11]** In Defendant's twelfth argument, she contends the trial court erred in determining that Plaintiff did not owe her any damages for violation of the consent agreement.

Defendant's argument is premised upon her contention that the trial court failed to make the appropriate findings of fact to support its conclusion that Plaintiff did not owe Defendant any damages. We have already remanded for findings related to the alleged loss of interest income. Defendant further argues that Plaintiff inherited furniture, jewelry, and gas and oil trusts and, pursuant to the 7 June 2006 agreement, Plaintiff was required to deposit fifteen percent of those items in the children's trust accounts prior to 21 January 2010.

Defendant states in the facts section of her brief that "[t]here was no distribution of furniture and jewelry to the minor children's trusts." There is evidence in the record that Plaintiff set aside jewelry and furniture as part of the fifteen percent distribution to the children. However, there are no findings of fact regarding the furniture and jewelry, or the purported oil and gas leases. Because the trial court has not made findings or conclusions concerning the distribution of these items, we remand for the entry of such.

## XIV.

**[12]** In Defendant's thirteenth argument, she contends the trial court erred by failing to order sanctions against Plaintiff, and by failing to award attorney's fees to Defendant. We disagree.

The decision to allow attorney's fees is in the discretion of the presiding judge, and is reversible by an appellate court only for abuse of discretion. "Abuse of discretion results where the court's ruling is manifestly unsupported by reason or is so arbitrary that it could not have been the result of a reasoned decision."

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[225 N.C. App. 368 (2013)]

*Davis v. Kelly*, 147 N.C. App. 102, 106, 554 S.E.2d 402, 405 (2001) (citations omitted). “According to well-established North Carolina law, ‘a broad discretion must be given to the trial judge with regard to sanctions.’” *Battle v. Sabates*, 198 N.C. App. 407, 417, 681 S.E.2d 788, 795 (2009) (citations omitted).

Defendant again fails to cite to any authority that would support her argument that Plaintiff should have been sanctioned, or that she should have been awarded attorney’s fees. N.C.R. App. P. 28(b)(6). Defendant does cite to authority in support of her argument that the trial court failed to enter appropriate findings and conclusions concerning sanctions and attorney’s fees. However, our review of the order shows that the trial court gave the issues of attorney’s fees and sanctions appropriate consideration, as reflected in its findings, and we find no abuse of discretion in either instance. *Battle*, 198 N.C. App. at 417, 681 S.E.2d at 795; *Davis*, 147 N.C. App. at 106, 554 S.E.2d at 405. This argument is without merit.

Affirmed in part, reversed and remanded in part.

Judges HUNTER, Robert C. and ELMORE concur.

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MICHAEL J. MCCRANN, KELLY C. MCCRANN, HENRY W. DIRKMAAT, LARILYN L. DIRKMAAT, ROBERT C. ANDERSON, JR., AND ANNE M. ANDERSON, PLAINTIFFS  
v.  
PINEHURST, LLC, VILLAGE OF PINEHURST, AND THE VILLAGE CHAPEL A/K/A  
VILLAGE CHAPEL, INC., DEFENDANTS

No. COA12-680

Filed 5 February 2013

**1. Appeal and Error—preservation of issues—issue not preserved**

Plaintiffs’ argument that the trial court erred in a declaratory judgment action involving restrictive covenants by ruling on defendants’ Rule 12(c) motion for judgment on the pleadings because defendants filed the motion simultaneously with their answer was not preserved for appellate review.

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[225 N.C. App. 368 (2013)]

**2. Jurisdiction—declaratory judgment—restrictive covenants**

Plaintiffs argument that the trial court erred in a declaratory judgment action involving restrictive covenants by granting defendants' Rule 12(c) motion and defendant Pinehurst, LLC's Rule 12(b)(6) motion was dismissed. Plaintiffs did not have standing to maintain the underlying action because plaintiffs were not parties to the deeds creating the restrictive covenants at issue, and there was no evidence of intent by the covenanting parties to benefit plaintiffs.

**3. Unfair Trade Practices—waivers of restrictive covenants—not fictitious or deceptive**

The trial court did not err in an unfair and deceptive acts or practices case by granting defendant Pinehurst, LLC's Rule 12(b)(6) motion to dismiss. Plaintiffs' contention that the waivers of restrictive covenants signed by defendant Pinehurst, LLC were fictitious and deceptive was without merit.

Appeal by plaintiffs from order entered 17 January 2012 by Judge James M. Webb in Moore County Superior Court. Heard in the Court of Appeals 14 November 2012.

*Ragsdale Liggett PLLC, by James L. Conner II, for plaintiffs-appellants.*

*Robbins May & Rich LLP, by John M. May, for defendant-appellee Pinehurst, LLC.*

*Van Camp, Meacham & Newman, PLLC, by Michael J. Newman, for defendant-appellee Village of Pinehurst.*

*Smith Moore Leatherwood LLP, by Matthew Nis Leerberg, for defendant-appellee The Village Chapel a/k/a Village Chapel, Inc.*

HUNTER, Robert C., Judge.

Plaintiff-landowners appeal from the trial court's order dismissing plaintiffs' claim for a declaratory judgment regarding defendant Pinehurst, LLC's purported waiver of restrictive covenants encumbering real property situated adjacent to plaintiffs' residential lots. Plaintiffs also appeal from the trial court's dismissal of their claim that by signing and filing the restrictive covenant waivers, Pinehurst, LLC committed acts that qualify as unfair and deceptive practices. After careful review, we affirm the trial court's order.

**McCRANN v. PINEHURST, LLC**

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**Background**

The record establishes that the town of Pinehurst, North Carolina was established on land once owned by Mr. Leonard Tufts. Mr. Tufts adopted a general plan for the development of the area, and, in 1895, commissioned a resort to be constructed on his land that included a central lot of 15 acres, which was commonly known as the Village Green.

In 1924, a church building was constructed on the Village Green and, over the years, portions of the original 15 acres were conveyed to other owners. As of 1982, only 9.3 acres of the Village Green remained, and it was then owned by Pinehurst Inc. Pinehurst Inc. divided the Village Green into two tracts of land and conveyed both tracts via gift deeds. Pinehurst Inc. conveyed a two-acre tract of the Village Green to Village Chapel, Inc. (a/k/a the Village Chapel) in 1982. In 1983, Pinehurst Inc. conveyed the remaining 7.3-acre tract of the Village Green to defendant The Village of Pinehurst, a North Carolina municipal corporation. Both gift deeds contained the following identical restriction on the construction of any building or permanent structure on the land:

This Conveyance is Subject to: . . . (v) the condition that that Grantee may not erect any building or permanent structure on the above described property and Grantee shall only use the property for access purposes, unpaved parking or as a naturally landscaped area, which conditions shall be appurtenant to and pass with the title to the property and for which any violation may be enforced by Grantor through injunctive relief.

(Hereinafter, “the restrictive covenants.”)

In 1984, Pinehurst Inc. conveyed ownership of the Pinehurst Hotel and Country Club to Resorts of Pinehurst, Inc. via a special warranty deed. This 1984 deed provided that the conveyance included “all rights of way, privileges, reversions and easements heretofore reserved, assigned or conveyed to Pinehurst [Inc.] or its predecessors in title.” In 1988, Resorts of Pinehurst, Inc. changed its name to Pinehurst, Inc., which is a corporate entity distinct from Pinehurst Inc. *See Bicket v. McLean Sec., Inc.*, 138 N.C. App. 353, 356, 532 S.E.2d 183, 184-85 (noting the relationship between Resorts of Pinehurst, Inc., Pinehurst, Inc., and Pinehurst Inc.), *disc. review denied*, 352 N.C. 587, 544 S.E.2d 777 (2000). In 2006, Pinehurst, Inc. was converted into Pinehurst, LLC.

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In 2008, Pinehurst, LLC signed a document purporting to release Village Chapel, Inc. from the restrictive covenant prohibiting construction on the two-acre tract of the Village Green that was conveyed via the 1982 gift deed. Similarly, in 2009, Pinehurst, LLC signed a document purporting to release The Village of Pinehurst from the same restrictive covenant contained in the 1983 gift deed conveying the 7.3-acre tract of the Village Green. (Hereinafter, “the waivers.”)

On 27 September 2011, Michael J. McCrann, Kelly C. McCrann, Henry W. Dirkmaat, Larilyn L. Dirkmaat, Robert C. Anderson, Jr., and Anne M. Anderson (collectively “plaintiffs”) filed the underlying action against defendants Pinehurst, LLC, The Village of Pinehurst, and Village Chapel, Inc. (collectively “defendants”). Plaintiffs are residents of Pinehurst who own and reside on real property adjacent to the Village Green.

In their complaint, plaintiffs alleged that Pinehurst, LLC’s purported waivers have created confusion as to whether the restrictive covenants in the 1982 and 1983 gift deeds still encumber the Village Green. In their first claim for relief, plaintiffs sought a declaratory judgment that Pinehurst, LLC’s waivers were ineffective. In support of this claim, plaintiffs alleged that Pinehurst, LLC was not the successor in interest to Pinehurst, Inc., the grantor of the restrictive covenant, and as such, Pinehurst, LLC did not have the authority to waive the restrictive covenants. Alternatively, plaintiffs contended that they are intended beneficiaries of the restrictive covenants and, thus, their consent to the waiver was required. Plaintiffs sought an injunction prohibiting any construction in violation of the restrictive covenants purportedly waived. In their second claim for relief, plaintiffs alleged that Pinehurst, LLC’s signing and filing of the waivers amounted to unfair and deceptive practices in or affecting commerce in violation of N.C. Gen. Stat. § 75-1.1.<sup>1</sup> Plaintiffs alleged that Pinehurst, LLC’s signing and filing of the waivers had resulted in a devaluation of their property, for which they sought to recover damages, treble damages, and attorneys’ fees.

Defendants filed their answer on 28 November 2011, which included a motion by Pinehurst, LLC to dismiss plaintiffs’ unfair and deceptive acts or practices claim for failure to state a claim for relief pursuant to North Carolina Rule of Civil Procedure 12(b)(6).

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1. Plaintiffs cite N.C. Gen. Stat. § 75-1.1 in their complaint to allege “unfair and deceptive trade practices” by Pinehurst, LLC. While references to the acts proscribed by this statute as “trade practices” persist in our caselaw, the word “trade” was removed from the statute in 1977. *See* 1977 N.C. Sess. Laws ch. 747, § 1.

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Separately, all defendants filed a motion for judgment on the pleadings pursuant to North Carolina Rule of Civil Procedure 12(c) as to plaintiffs' declaratory judgment claim arguing that no material issue of fact existed and that defendants were entitled to judgment as a matter of law. The matter was heard in the 9 December 2011 term of the Moore County Civil Superior Court, Judge James M. Webb presiding. After considering the arguments of counsel, the pleadings, and the attached exhibits, the trial court entered an order on 17 January 2012 granting both motions. Plaintiffs appeal.

**Discussion**

Plaintiffs first argue that the trial court erred in ruling on defendants' Rule 12(c) motion for a judgment on the pleadings because defendants filed the motion simultaneously with their answer. *See Weaver v. Saint Joseph of the Pines, Inc.*, 187 N.C. App. 198, 203, 652 S.E.2d 701, 706 (2007) ("[A] Rule 12(c) motion cannot be filed simultaneously with an answer."). During the hearing on the motion, plaintiffs informed the trial court of the timing of defendants' filings. However, plaintiff's counsel expressly stated that he was not seeking any relief from the trial court on that basis. Accordingly, the issue has not been preserved for our review. N.C. R. App. P. 10(a) (2012).

**[2]** Next, plaintiffs make multiple arguments alleging that the trial court erred in granting defendants' Rule 12(c) motion and Pinehurst, LLC's Rule 12(b)(6) motion. Because we conclude that plaintiffs do not have standing to maintain the underlying action, we affirm the trial court's order.

"Standing is a necessary prerequisite to the court's proper exercise of subject matter jurisdiction." *Creek Pointe Homeowner's Ass'n v. Happ*, 146 N.C. App. 159, 164, 552 S.E.2d 220, 225 (2001), *disc. review denied*, 356 N.C. 161, 568 S.E.2d 191 (2002). "If a party does not have standing to bring a claim, a court has no subject matter jurisdiction to hear the claim." *Woodring v. Swieter*, 180 N.C. App. 362, 366, 637 S.E.2d 269, 274 (2006) (quoting *Coker v. DaimlerChrysler Corp.*, 172 N.C. App. 386, 391, 617 S.E.2d 306, 310 (2005)). Whether a party has standing is a question of law which we review *de novo*, *Indian Rock Ass'n v. Ball*, 167 N.C. App. 648, 650, 606 S.E.2d 179, 180 (2004), and may be raised for the first time on appeal and by this Court's own motion, *Myers v. Baldwin*, 205 N.C. App. 696, 698, 698 S.E.2d 108, 109 (2010).

Plaintiffs first contend that they have standing to maintain their action under general principals of standing. Plaintiffs cite *Happ*, 146

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N.C. App. at 168-69, 552 S.E.2d at 227, wherein this Court held a subdivision's homeowner's association had standing to maintain a lawsuit against a lot owner for his building a fence across a road in the subdivision. The fence was in violation of a restrictive covenant that granted access to the subdivision's roads to all of the subdivision's residents. *Id.* Because the homeowner's association had a duty to maintain the roads within the subdivision and the defendant's construction of the fence interfered with the association's ability to carry out that duty, the association had standing to seek an injunction. *Id.* This case is distinguishable as plaintiffs have no contractual duty or right conferred by the restrictive covenants that were subject of Pinehurst, LLC's waivers.

Plaintiffs also cite *Taylor v. Kenton*, 105 N.C. App. 396, 401, 413 S.E.2d 576, 579 (1992), for the proposition that, "generally grantees in a subdivision are beneficiaries of any and all restrictive covenants imposed upon the subdivision so as to give them standing to challenge alleged violations of the restrictive covenants." *Taylor*, however, is distinguishable. In *Taylor*, the plaintiffs' and the defendants' lots were part of a residential subdivision. *Id.* at 397-98, 413 S.E.2d at 577. The defendants granted a private easement to a third party who owned land adjacent to the subdivision for the construction of a driveway across the defendants' lot; the plaintiffs sued and obtained an injunction to prevent the construction. *Id.* at 398, 413 S.E.2d at 577. This Court affirmed the trial court's award of an injunction as we concluded the private easement was in contravention of the restrictive covenants that applied to all lot owners in the subdivision. *Id.* at 400, 413 S.E.2d at 578. Here, plaintiffs did not allege that the restrictive covenants that Pinehurst, LLC purported to waive are in contravention of the restrictive covenants included in the Pinehurst Town Plan ("the Town Plan"). The gift deeds conveying the Village Green property to Village Chapel, Inc. and The Village of Pinehurst included references to the restrictive covenants in the Town Plan and added one restrictive covenant. It was this additional restrictive covenant that was the subject of Pinehurst, LLC's waivers, and the waivers do not purport to alter any restrictive covenants from the Town Plan.

Next, plaintiffs contend that they have standing to maintain their action under the Declaratory Judgment Act as they are parties "interested under a deed . . . written contract or other writings constituting a contract" that seek a "declaration of [their] rights, status, or other legal relations thereunder." N.C. Gen. Stat. § 1-254 (2011). Plaintiffs cite cases from this Court in which we have determined the enforce-

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ability of restrictive covenants under the Declaratory Judgment Act. We conclude, however, those cases are distinguishable as the plaintiffs in those cases sought interpretation of restrictive covenants when the covenants were common to the lots of both parties, *Medearis v. Trustees of Myers Park Baptist Church*, 148 N.C. App. 1, 2, 558 S.E.2d 199, 201 (2001), *disc. review denied*, 355 N.C. 493, 563 S.E.2d 190 (2002), and *Hultquist v. Morrow*, 169 N.C. App. 579, 580-81, 610 S.E.2d 288, 290, *disc. review denied*, 359 N.C. 631, 616 S.E.2d 235 (2005), where the plaintiffs had been assigned a right to enforce the restrictive covenants, *Claremont Prop. Owners Ass'n v. Gilboy*, 142 N.C. App. 282, 284, 542 S.E.2d 324, 326 (2001), where the plaintiff sought a declaration of its rights relating to a restrictive covenant in its own deed, *Wal-Mart Stores, Inc. v. Ingles Mkts., Inc.*, 158 N.C. App. 414, 415, 581 S.E.2d 111, 113 (2003), or where a subdivision association sought a determination of whether a particular land use on a lot in the subdivision violated the subdivision's restrictive covenants, *Parkwood Ass'n v. Capital Health Care Investors*, 133 N.C. App. 158, 160, 514 S.E.2d 542, 544, *disc. review denied*, 350 N.C. 835, 539 S.E.2d 291 (1999).

Here, plaintiffs seek a declaratory judgment concerning restrictive covenants created in deeds between Pinehurst, LLC, Village Chapel, Inc., and The Village of Pinehurst. Plaintiffs were not parties to the deeds in which the restrictive covenants were created. Plaintiffs are not successors in title or interest to the land burdened or benefited by the restrictive covenants. Nor, as discussed below, are plaintiffs intended beneficiaries of the restrictive covenants. Thus, we conclude, they are not interested parties in the 1982 and 1983 gift deeds or the subsequent waivers signed by Pinehurst, LLC such as to give them standing under the Declaratory Judgment Act.

Next, plaintiffs contend that they have standing to maintain their action against defendants because the restrictive covenant that Pinehurst, LLC purported to waive is an appurtenant easement created by implied dedication for the benefit of plaintiffs' real property. We disagree.

"A restrictive covenant is a servitude, commonly referred to as a negative easement . . . . In ascertaining the enforceability of restrictive covenants by persons not party thereto, it must be determined whether the grantor intended to create a negative easement for their benefit." *Hawthorne v. Realty Syndicate, Inc.*, 43 N.C. App. 436, 440, 259 S.E.2d 591, 593 (1979), *aff'd*, 300 N.C. 660, 268 S.E.2d 494 (1980).



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“An appurtenant easement is an easement created for the purpose of benefitting particular land. This easement attaches to, passes with and is an incident of ownership of the particular land.” *Shear v. Stevens Bldg. Co.*, 107 N.C. App. 154, 161, 418 S.E.2d 841, 846 (1992). An appurtenant easement may be created through a dedication of land to a particular use. *Id.* at 162, 418 S.E.2d at 846. Such a dedication may be implied through the actions of the owner but requires “‘the intent to appropriate the land to public use[.]’” *Id.* at 163, 418 S.E.2d at 847 (quoting *Spaugh v. Charlotte*, 239 N.C. 149, 159, 79 S.E.2d 748, 756 (1954)). In *Shear*, this Court concluded that a land developer impliedly dedicated a lake and surrounding property to the use of the subdivision’s residents. *Id.* The developer’s actions evidencing its intent for a dedication to the subdivision residents included recording a plat map that depicted the lake, surrounding undeveloped property, and all of the residential lots, coupled with references to the plat map in conveyances of residential lots. *Id.* at 162-63, 418 S.E.2d at 846.

Plaintiffs contend that the Village Green was impliedly dedicated as a natural space by the previous owners of their lots and the owners of the Village Green because the Village Green was included on plats and maps for over a hundred years. Plaintiffs argument is contradicted by the fact that while the Village Green was originally a 15-acre tract, only 9.3 acres remained as of 1982. Moreover, while the record contains some evidence that the town of Pinehurst was established according to a general plan of development with certain restrictive covenants applying to the real property therein, the restrictive covenants at issue here were not part of that general plan. The restrictive covenants purportedly waived by Pinehurst, LLC do not appear in any deed prior to the 1982 and 1983 gift deeds between Pinehurst Inc., Village Chapel, Inc., and The Village of Pinehurst.

Plaintiffs further contend that Pinehurst Inc. demonstrated its intent to dedicate the Village Green to use as a natural space by its inclusion of the restrictive covenants in the gift deeds. We conclude the record does not support the conclusion Pinehurst Inc. demonstrated any intent to dedicate the Village Green as natural space to the benefit of surrounding residents. Plaintiffs were not parties to the gift deeds and nothing in the restrictive covenants that were the subject of the waivers implies an intent to benefit anyone but the grantor, Pinehurst Inc., its successors and assigns. These restrictive covenants were not part of a common scheme of development, and they expressly state that violation of the covenants may be enforced

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by Pinehurst Inc., its successors and assigns. Thus, we conclude that Pinehurst Inc. did not create an appurtenant easement in the Village Green by implied dedication.

Plaintiffs also argue that they have standing to enforce the restrictive covenants as a matter of equity under the theory of equitable servitude. We disagree.

In order to enforce a restrictive covenant under the theory of equitable servitude, plaintiffs must show “(1) that the covenant touches and concerns the land, and (2) that the original covenanting parties intended the covenant to bind the person against whom enforcement is sought *and to benefit the person seeking to enforce the covenant.*” *Runyon v. Paley*, 331 N.C. 293, 310, 416 S.E.2d 177, 190 (1992) (emphasis added). The covenanting parties’ intent to benefit the person seeking to enforce the covenant may be shown by evidence of: (1) “a common scheme of development”; (2) “succession of interest to benefitted property retained by the covenantee”; or (3) “an express statement of intent to benefit property owned by the party seeking enforcement.” *Id.* at 311-12, 416 S.E.2d at 190 (internal citations omitted).

We conclude the record does not support a finding of the covenanting party’s intent to benefit plaintiffs by any one of these three methods. First, the restrictive covenants at issue were not imposed for a common scheme of development that included plaintiffs’ real property. Second, plaintiffs are not successor in interest to any benefitted property retained by the covenantee, Pinehurst Inc. Third, the restrictive covenants do not contain an express statement of intent to benefit real property owned by plaintiffs. As plaintiffs have not established that the original covenanting parties intended for the covenant to benefit them, they have not established their right to enforce the restrictive covenants under the theory of equitable servitude.

As the Supreme Court of North Carolina has stated, covenants restricting the free use of real property “‘will not be aided or extended by implication or enlarged by construction to affect lands not specifically described, or to grant rights to persons in whose favor it is not clearly shown such restrictions are to apply.’” *Long v. Branham*, 271 N.C. 264, 268, 156 S.E.2d 235, 239 (1967) (citation omitted). Plaintiffs were not parties to the deeds creating the restrictive covenants at issue, and there is no evidence of an intent by the covenanting parties to benefit plaintiffs. We conclude plaintiffs lack standing to maintain their claim.

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[225 N.C. App. 368 (2013)]

[3] Next, plaintiffs argue the trial court erred in granting Pinehurst LLC's Rule 12(b)(6) motion to dismiss plaintiffs' claim for unfair and deceptive acts or practices under N.C. Gen. Stat. § 75-1.1. We disagree.

In our review of the trial court's ruling on a motion to dismiss under North Carolina Rule of Civil Procedure 12(b)(6), "[t]his Court must conduct a *de novo* review of the pleadings to determine their legal sufficiency and to determine whether the trial court's ruling on the motion to dismiss was correct." *Leary v. N.C. Forest Prods., Inc.*, 157 N.C. App. 396, 400, 580 S.E.2d 1, 4, *aff'd per curiam*, 357 N.C. 567, 597 S.E.2d 673 (2003). While we treat plaintiffs' factual allegations as true, we may ignore plaintiffs' legal conclusions. *Ragsdale v. Kennedy*, 286 N.C. 130, 137, 209 S.E.2d 494, 499 (1974).

Plaintiffs argue that the filing of the waivers by Pinehurst, LLC were deceptive acts because Pinehurst, LLC had no connection to the property to which the restrictive covenants were attached. We interpret plaintiffs' argument to contend that Pinehurst, LLC did not have the authority to waive the restrictive covenants in the 1982 and 1983 gift deeds. However, as described above, Resorts of Pinehurst, Inc., which was the corporate predecessor to Pinehurst, LLC, acquired Pinehurst Country Club in 1984 from Pinehurst Inc. The deed conveying the property provided for the conveyance of "all rights of way, privileges, reversions and easements heretofore reserved, assigned or conveyed to Pinehurst [Inc.] or its predecessors in title." Thus, plaintiffs' contention that Pinehurst Inc. was not the corporate predecessor to Pinehurst, LLC and their insistence that the 1984 deed did not convey the Village Green to Pinehurst, LLC are irrelevant. Pinehurst Inc. conveyed all easements it owned to the corporate predecessor of Pinehurst, LLC via the 1984 deed, which included Pinehurst Inc.'s rights in the restrictive covenants included in the 1982 and 1983 gift deeds. *See Mason-Reel v. Simpson*, 100 N.C. App. 651, 654, 397 S.E.2d 755, 756 (1990) ("The meaning of the terms of the deed is a question of law, not of fact."). Accordingly, plaintiffs' contention that the waivers signed by Pinehurst, LLC were fictitious and deceptive is without merit.

**Conclusion**

For the reasons stated above, we conclude the trial court did not err in dismissing plaintiffs' claims, and we affirm the trial court's order.

AFFIRMED.

Judges CALABRIA and ROBERT N. HUNTER, JR. concur.

**McCRARY v. KING BIO, INC.**

[225 N.C. App. 378 (2013)]

MITZI MCCRARY, PLAINTIFF

v.

KING BIO, INC., EMPLOYER, ISURITY INSURANCE SERVICES/NCME FUND,  
CARRIER, DEFENDANTS

No. COA12-405

Filed 5 February 2013

**Workers' Compensation—compensability—wrist injury—catching frozen package**

A workers' compensation award arising from a hand injury sustained in an effort to catch a large package of frozen bison meat that had slipped was affirmed. The evidence supported the Commission's findings, which in turn supported its conclusions of law with respect to compensability. Plaintiff was not required to present expert testimony in order to make the necessary showing of a causal link between the injury, during which her wrist "popped," and her immediate wrist pain. However, the record contained expert opinion evidence describing the relationship between plaintiff's work-related injury and her subsequent wrist pain. Finally, even if her twenty-year-old pre-existing carpal tunnel syndrome contributed to the pain, that fact would not render her injury noncompensable.

Appeal by defendants from Opinion and Award entered 23 December 2011 by the North Carolina Industrial Commission. Heard in the Court of Appeals 13 September 2012.

*Ganly & Ramer, by Thomas F. Ramer, for Plaintiff-appellee.*

*Orbock Ruark & Dillard, PA, by Barbara E. Ruark and Jessica E. Lyles, for Defendant-appellants.*

ERVIN, Judge.

Defendants King Bio, Inc., and Isurity Insurance Services appeal from a Commission order awarding workers' compensation medical benefits to Plaintiff Mitzi McCrary. In challenging the Commission's order, Defendants argue that the Commission erroneously awarded medical benefits to Plaintiff on the grounds that Plaintiff failed to present competent medical evidence to prove that her wrist injury was caused by a workplace accident that occurred on 14 October 2009, and that this Court should rectify this error by simply reversing the Commission's decision rather than requiring further proceedings on

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remand. After careful consideration of Defendants' challenges to the Commission's order in light of the record and the applicable law, we conclude that the Commission's order should be affirmed.

I. BackgroundA. Substantive Facts

Defendant King Bio operated King Bio, a homeopathic medical supplier, and Carolina Bison, a supplier of bison meat, at a joint facility. Plaintiff, who was born on 16 September 1955, started working as an inventory and purchasing manager for both entities on 28 August 1998. In the course of its business, Carolina Bison received packages of meat, which were sometimes frozen and which varied in size. One of the duties that Plaintiff performed for Carolina Bison was to assist with the repackaging of meat into smaller packages.

On 14 October 2009, Plaintiff was assisting Bernave Acevedo, a warehouse manager, in repackaging a bison meat order that had a total weight of approximately fifteen hundred pounds and had been separated into twenty-five packages, each of which weighed approximately sixty pounds. After Mr. Acevedo unloaded the packages of meat and placed them on a work table, Plaintiff lifted each package from the work table onto a scale, wiped it down, weighed it, and labeled it. In addition to being heavier and bulkier than usual, the packages which made up this order had been frozen, were slippery and had to be handled using more force and grip than was normally the case.

As Plaintiff was lifting one of the packages of meat onto the scale, it slipped from her hand. As she tried to catch the falling package, Plaintiff felt a "pop" in her wrist and experienced "very intense" pain. Mr. Acevedo, who was facing Plaintiff and located approximately four to five feet away from her, saw the package of meat fall out of Plaintiff's hand, observed Plaintiff try to catch the package, and heard Plaintiff's wrist "pop." Plaintiff told Mr. Acevedo that "she [had] done something to her wrist."

In spite of her injury, Plaintiff worked the remainder of the day with assistance from Mr. Acevedo. On the following day, Plaintiff continued to experience pain in her right wrist and reported her injury to her supervisor. At that point, Plaintiff was given a brace for her wrist.

On 23 October 2009, Plaintiff sought treatment from Sisters of Mercy Urgent Care. On 27 October 2009, Sisters of Mercy Urgent Care

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provided Defendant with an “Employee Medical Care Report” which noted that Plaintiff’s 14 October 2009 right wrist injury was work related. On 29 October 2009, Plaintiff sought treatment from Dr. Ronald Neimkin, a hand surgeon with Carolina Hand Surgery Associates. At that time, Plaintiff informed Dr. Neimkin that she had undergone bilateral carpal tunnel releases twenty years earlier. After referring Plaintiff to Dr. Terry McGhee for an EMG, nerve conduction studies, and an MR arthrogram in order to determine whether there were any soft tissue tears in her right wrist, Dr. Neimkin released Plaintiff to work subject to certain restrictions. Plaintiff did not miss any work as a result of her wrist injury and has not sought disability compensation.

**B. Procedural History**

On 17 December 2009, Plaintiff filed an Industrial Commission Form 18 asserting a claim for workers’ compensation medical benefits on the grounds that she had injured her right hand while “repackaging unusually heavy, frozen meat” on 14 October 2009. On 26 October 2009, Defendants filed a Form 19 in which they reported Plaintiff’s injury to the Commission, indicated that Plaintiff had been working with frozen meat when her “wrist popped,” and noted that the incident had been “witnessed by [a] fellow employee.” On 4 December 2009, Defendants filed a Form 61 in which they denied Plaintiff’s claim on the grounds that “no injury by accident occurred within the course and scope of [Plaintiff’s] employment” but agreed to pay for “authorized medical treatment through 12/04/2009.”<sup>1</sup> On 3 June 2010, Plaintiff filed a Form 33 in which she requested that her claim for medical benefits be set for hearing. Defendants filed a Form 33R response to Plaintiff’s request for a hearing in which they alleged, in pertinent part, that:

. . . [P]laintiff did not suffer an injury to her hand and wrist as a result of an accident in that she was performing her normal work duties in the normal manner at the time that she sustained an injury to her wrist. Defendants further contend that [P]laintiff has not been diagnosed with any condition other than an alleged upper-extremity injury. . . .

On 17 November 2010, Deputy Commissioner Victoria M. Homick conducted a hearing concerning the merits of Plaintiff’s claim for

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1. After Defendants denied her workers’ compensation claim, Plaintiff was unable to obtain further medical treatment for her wrist.

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workers' compensation medical benefits. On 16 May 2011, Deputy Commissioner Homick entered an order denying Plaintiff's claim, finding, in pertinent part, that "the incident on October 14, 2009 occurred while [P]laintiff was performing her work duties in the normal manner without any unusual circumstance which would constitute an interruption of her job routine" and that "there is insufficient evidence to show that the condition in [P]laintiff's right hand was a result of any work injury that she may have sustained on October 14, 2009." On 23 May 2011, Plaintiff noted an appeal to the Commission from Deputy Commissioner Homick's order.

The Commission heard Plaintiff's claim on 19 October 2011. On 23 December 2011, the Commission, by means of an order entered by Commissioner Bernadine S. Ballance with the concurrence of Commissioner Danny McDonald, reversed Deputy Commissioner Homick's decision and awarded Plaintiff workers' compensation medical benefits. Commissioner Tammy Nance dissented from the order based upon her inability to conclude that Plaintiff had suffered an injury by accident. Defendants noted an appeal to this Court from the Commission's decision.

## II. Legal Analysis

### A. Standard of Review

Appellate review of a Commission order is "limited to reviewing whether any competent evidence supports the Commission's findings of fact and whether the findings of fact support the Commission's conclusions of law," *Deese v. Champion Int'l Corp.*, 352 N.C. 109, 116, 530 S.E.2d 549, 553 (2000), with the Commission having sole responsibility for evaluating the weight and credibility to be given to the record evidence. *Id.* (citation omitted). "[F]indings of fact which are left unchallenged by the parties on appeal are 'presumed to be supported by competent evidence' and are, thus 'conclusively established on appeal.'" *Chaisson v. Simpson*, 195 N.C. App. 463, 470, 673 S.E.2d 149, 156 (2009) (quoting *Johnson v. Herbie's Place*, 157 N.C. App. 168, 180, 579 S.E.2d 110, 118, *disc. review denied*, 357 N.C. 460, 585 S.E.2d 760 (2003)). However, the "Commission's conclusions of law are reviewed *de novo*." *McRae v. Toastmaster, Inc.*, 358 N.C. 488, 496, 597 S.E.2d 695, 701 (2004) (citation omitted).

"To establish 'compensability' under the North Carolina Workers' Compensation Act (the Act), a 'claimant must prove three elements: (1) [t]hat the injury was caused by an accident; (2) that the injury arose out of the employment; and (3) that the injury was sustained in

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the course of employment.’ ” *Clark v. Wal-Mart*, 360 N.C. 41, 43, 619 S.E.2d 491, 492 (2005) (quoting *Gallimore v. Marilyn’s Shoes*, 292 N.C. 399, 402, 233 S.E.2d 529, 531 (1977)). The “claimant in a workers’ compensation case bears the burden of initially proving ‘each and every element of compensability[.]’ . . . by a ‘greater weight’ of the evidence or a ‘preponderance’ of the evidence.” *Adams v. Metals USA*, 168 N.C. App. 469, 475, 608 S.E.2d 357, 361 (quoting *Whitfield v. Laboratory Corp. of Am.*, 158 N.C. App. 341, 350, 581 S.E.2d 778, 784 (2003), and *Phillips v. U.S. Air, Inc.*, 120 N.C. App. 538, 541-42, 463 S.E.2d 259, 261 (1995), *aff’d*, 343 N.C. 302, 469 S.E.2d 552 (1996)), *aff’d*, 360 N.C. 54, 619 S.E.2d 495 (2005). In reviewing the Commission’s determinations, the Supreme Court has noted that:

[t]here will be “many instances in which the facts in evidence are such that any layman of average intelligence and experience would know what caused the injuries complained of.” On the other hand, where the exact nature and probable genesis of a particular type of injury involves complicated medical questions far removed from the ordinary experience and knowledge of laymen, only an expert can give competent opinion evidence as to the cause of the injury.

*Click v. Freight Carriers*, 300 N.C. 164, 167, 265 S.E.2d 389, 391 (1980) (quoting *Gillikin v. Burbage*, 263 N.C. 317, 325, 139 S.E. 2d 753, 760 (1965)). We will now review Defendants’ challenge to the Commission’s order utilizing the applicable standard of review.

**B. Causation**

In their brief, Defendants argue that there is “no competent medical evidence in this case to satisfy Plaintiff’s burden of proof that she sustained an injury to her wrist as a result of the incident that . . . occurred on October 14, 2009.” We do not find Defendants’ argument persuasive.

As a preliminary matter, we note that Defendants have not argued that the record lacks sufficient evidence to support the Commission’s determinations that (1) Plaintiff was involved in a workplace accident that occurred in the course and scope of her employment on 14 October 2009; (2) Plaintiff experienced intense pain both immediately after the accident and later; (3) Plaintiff subsequently experienced intermittent numbness to her hand and fingers; and (4) further testing is needed in order to resolve issues such as the specific mechanism that led to Plaintiff’s injury and the extent, if any, to which the 14



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October 2009 accident may have implicated the carpal tunnel syndrome for which she had received treatment twenty years prior to the accident. Instead, Defendants' challenge to the Commission's decision is focused on the lawfulness of the Commission's determination that the pain that Plaintiff has experienced and continues to experience stemmed from the 14 October 2009 accident.

In its order, the Commission found as fact that:

4. On October 14, 2009, Plaintiff was assisting warehouse manager, Bernave Acevedo, in repackaging a bison meat order

. . . .

5. Plaintiff testified that while lifting one of the packages of meat onto the scale, the package began to slip from her hand and as she tried to catch it, she immediately felt a "pop" in her wrist accompanied by "very intense" pain. Plaintiff told Mr. Acevedo that "she [had] done something to her wrist." Mr. Acevedo witnessed the incident. He testified that he was working in the same area as Plaintiff and was about four (4) to five (5) feet away with his head facing her. He observed the package of meat falling out of Plaintiff's hand, observed Plaintiff catching the package and heard Plaintiff's arm "pop." The Full Commission finds the testimony of Plaintiff and Mr. Acevedo regarding how Plaintiff's injury occurred to be credible.

. . . .

7. Susie King, Vice President of King Bio, testified that . . . she had no reason to question the veracity of the information provided to her by Mr. Acevedo . . . [and that] Mr. Acevedo was the best person to know what was received, loaded and unloaded on October 14, 2009[.] . . . The Full Commission gives greater weight to Mr. Acevedo's testimony on the weight of the meat packages on October 14, 2009 over any contrary evidence.

. . . .

9. After her injury, Plaintiff worked the remainder of the day with assistance from Mr. Acevedo. Due to continuing pain in her right wrist, Plaintiff reported her

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injury to her supervisor on October 15, 2009 and was given a brace for her wrist.

10. Plaintiff sought treatment from Sisters of Mercy Urgent Care on October 23, 2009. According to the medical notes from that visit, she reported a right wrist injury after pulling/packing meat on October 14, 2009. . . .

11. On October 27, 2009, Sisters of Mercy Urgent Care provided Defendant-Employer with an “Employee Medical Care Report.” The report noted that Plaintiff’s right wrist injury on October 14, 2009 was work related. . . .

12. On October 29, 2009, Plaintiff sought treatment from Dr. Ronald Neimkin, a hand surgeon with Carolina Hand Surgery Associates. According to Dr. Neimkin’s notes, [after the incident,] . . . Plaintiff began experiencing right wrist pain with swelling, numbness and tingling of the right hand with pain being a seven (7) out of ten (10). Plaintiff informed Dr. Neimkin that she had undergone bilateral carpal tunnel releases twenty (20) years prior. Dr. Neimkin diagnosed her with possible carpal tunnel syndrome and possible cervical radiculopathy. He was also concerned that Plaintiff might have a possible ligament tear or triangular fibrocartilage tear of her right wrist. He referred Plaintiff to Dr. Terry McGhee for an EMG and nerve conduction studies and an MR arthrogram to help delineate whether there were any soft tissue tears in her right wrist. . . .

. . . .

15. After considering all of the evidence presented, the Full Commission gives less weight to Plaintiff’s recorded statement and to the descriptions of how the injury occurred found in medical records, than to Plaintiff’s testimony at [the] hearing before the Deputy Commissioner which is corroborated by the eye witness testimony of Mr. Acevedo.

. . . .

17. On November 13, 2009, Plaintiff presented to Dr. Glen Gaston, an orthopedic surgeon. His medical notes indicated that Plaintiff began to experience ulnar

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sided right wrist pain radiating into her elbow and with intermittent numbness to her hand and fingers after handling frozen meat packages at work on October 14, 2009. . . . He diagnosed Plaintiff as having ulnar nerve carpal impaction with some diffuse pain and numbness with a history of bilateral carpal tunnel release. Dr. Gaston recommended an ulnocarpal joint injection and . . . administered an injection of Celestone and Lidocaine in the ulnocarpal joint[.]. . .

18. On February 16, 2010, Plaintiff returned to Dr. Ronald Neimkin, with continued complaints of pain in her right wrist on the ulnar side, radiating to her thumb with constant numbness and tingling in all of her digits. . . . Dr. Neimkin again recommended EMG studies and an MR Arthrogram.

19. On the issue of causation, in a March 10, 2010 letter, Dr. Gaston opined that, “while her work did not cause her ulnocarpal impaction; it very likely did cause the acute pain associated with it.” Dr. Gaston further opined that[,] based on Plaintiff’s ongoing right wrist pain, he would recommend an MRI to test for a possible concomitant TFCC tear.

. . . .

23. The Full Commission finds as fact that Plaintiff has proven that her injury occurred as the result of an accident. When the slippery, frozen package of meat unexpectedly slipped out of Plaintiff’s hand on October 14, 2009, and she sustained an injury to her wrist as she tried to catch it, this slipping incident constituted an unlooked for and untoward event, which was an interruption of Plaintiff’s normal work routine and was, thus, an accident under the Workers’ Compensation Act. Therefore, Plaintiff sustained a compensable injury by accident arising out of and in the course of her employment on October 14, 2009.

24. Based upon a preponderance of the evidence, the Full Commission finds that Plaintiff’s right wrist pain on the ulnar side, radiating to her thumb, with numbness and tingling in all of her digits, is causally related to her injury by accident on October 14, 2009. No

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doctors were deposed; however, the medical records from Sisters of Mercy Urgent Care indicated that the right wrist injury Plaintiff sustained on October 14, 2009 was work related. Dr. Gaston also noted that Plaintiff's acute pain in her right wrist is "very likely" work related. Additionally, Plaintiff testified, and the Full Commission finds as fact, that as a result of the accident, she immediately felt immense pain in her right wrist and has had right wrist pain, numbness and tingling since that time. Plaintiff has not reached maximum medical improvement from her injury.

25. As a result of her injury, Plaintiff needs further diagnostic testing to evaluate and determine whether the ulnocarpal impaction, the possible TFCC tear, and other suspected right wrist conditions are causally related to her injury.

We conclude that the evidence supports the Commission's findings, which in turn support its conclusions of law with respect to the compensability issue.

In urging us to reach a contrary conclusion, Defendants argue that this case "involves a complicated medical issue for which an expert medical opinion is required" and that "[t]he facts of this case are sufficiently complex as to require expert opinion on medical causation." In support of this assertion, Defendants cite several cases holding that expert medical evidence was required to establish a causal relationship between an accident or injury and the specific diagnosis proffered by a claimant. However, each of the decisions upon which Defendants rely involves conditions which are clearly beyond the diagnostic capabilities of an ordinary layperson. For example, in *Click*, in which the plaintiff sought compensation for a herniated disc, the Supreme Court noted the "difficulty of pinpointing the precise causative factors [underlying] disc injuries" and held that expert medical evidence was required to establish the cause of the claimant's herniated disc. *Click*, 300 N.C. at 168, 265 S.E.2d at 391. See also, e.g., *Holley v. ACTS, Inc.*, 357 N.C. 228, 233-34, 581 S.E.2d 750, 753-54 (2003) (deep vein thrombosis), and *Young v. Hickory Bus. Furn.*, 353 N.C. 227, 230-33, 538 S.E.2d 912, 915-17 (2000) (fibromyalgia).

In this present case, unlike those upon which Defendants rely, the Commission did not conclude that Plaintiff suffered from a specific disease that could only be diagnosed based upon information con-

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tained in expert medical testimony. Instead, the Commission found, in essence, that the accident during which Plaintiff's wrist "popped" caused the pain she was experiencing.<sup>2</sup> Defendants have not cited any authority in support of the proposition that a workplace accident that is followed by and appears to immediately result in severe pain is not compensable unless or until a specific medical diagnosis is made. Instead, the appellate courts in this jurisdiction have indicated that there is no need for expert medical testimony in order to establish a link between a work-related accident and the plaintiff's current condition in circumstances similar to the one at issue here.

For example, in *Click*, 300 N.C. at 168-69, 265 S.E.2d at 392 the Supreme Court stated that "the 'distinguishing features' of most compensation cases holding [that] medical testimony [would be] unnecessary to make a *prima facie* case of causation include '[a]n uncomplicated situation, the immediate appearance of symptoms, the prompt reporting of the occurrence by the workman to his superior and consultation with a physician, and the fact that the plaintiff was theretofore in good health and free from any disability of the kind involved' " coupled with " 'the absence of expert testimony that the alleged precipitating event could not have been the cause of the injury' " (quoting *Uris v. State Compensation Dept.*, 247 Or. 420, 426, 427 P.2d 753, 756 (1967)). See also *Slizewski v. Seafood, Inc.*, 46 N.C. App. 228, 233-35, 264 S.E.2d 810, 813-14 (1980) (holding that "the evidence was sufficient to support the Commission's finding of fact that the hematoma caused brain damage rendering the plaintiff a partial hemiplegic and reducing his visual capabilities" given that, "[p]rior to the fall, plaintiff was a healthy young man with no history of seizures, paralysis or visual disability;" that the plaintiff "went into convulsions which continued after he was admitted to the hospital" "[a]s soon as [he] fell landing directly on his head;" and that a physician testified that, "the day after the fall, . . . plaintiff was completely unconscious, had some movement on his right side but had no movement of his left arm and leg and had a complete left hemiplegia"). As a result, given that the situation at issue here was "uncomplicated," that Plaintiff's wrist pain appeared "immediately" after the accident and has continued since that time, that one of Plaintiff's co-workers observed the accident and corroborated Plaintiff's account of the cir-

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2. The parties appear to agree that further testing is required to identify the precise mechanism implicated by Plaintiff's "popped" wrist; however, having denied Plaintiff's request for additional medical treatment after 4 December 2009, Defendants have limited Plaintiff's ability to obtain any additional testing necessary to explain the reason that Plaintiff was continuing to experience wrist pain.

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cumstances surrounding her injury, that Plaintiff promptly reported the injury to her superiors and sought medical treatment, and that Plaintiff did not have any pain in her wrist prior to the injury, we conclude that Plaintiff was not required to present expert testimony in order to make the necessary showing of a causal link between the injury and her wrist pain in this case.<sup>3</sup>

Furthermore, even if expert testimony concerning the causal relationship between Plaintiff's 14 October 2009 accident and the intense pain that Plaintiff experienced immediately after trying to grab the falling meat packet were necessary for a finding of compensability, we note that the Commission found that Dr. Gaston addressed "the issue of causation" in a letter and stated that Plaintiff's work "very likely did cause the acute pain associated with" Plaintiff's ulnocarpal impaction. Although Defendants contend that this letter does not constitute competent causation-related evidence because it was written in response to a letter asking for an opinion concerning the relationship between Plaintiff's general working conditions and a possible occupational disease, Dr. Gaston clearly characterized Plaintiff's injury in the letter in question by stating that:

[Plaintiff] had an injury to her wrist while at work on October 14, 2009 when she had immediate ulnar-sided wrist pain. . . . Sub-sequently, her work comp case was denied. The patient has questions concerning whether or not this truly is a work related injury.

. . . .

As a result, the record does, in fact, contain expert opinion evidence describing the relationship between Plaintiff's work-related injury and her subsequent wrist pain.

Finally, Defendants direct our attention to evidence tending to show that, some twenty years before the accident, Plaintiff was treated for carpal tunnel syndrome. The record does not, however, contain any evidence tending to show that Plaintiff suffered from carpal tunnel syndrome at any time after the conclusion of that treatment. Moreover, according to well-established North Carolina law:

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3. Although Defendants argue that Plaintiff has failed to satisfy the requirements for relying on non-expert testimony bearing on the causation issue on the grounds that her prior treatment of carpal tunnel syndrome showed that she was not in good health and free from a disability of the wrist prior to her injury, the record contains, as we note elsewhere, no indication that Plaintiff was experiencing any wrist-related difficulty at or at any recent time before the date that she was injured.

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In workers' compensation actions the rule of causation is that where the right to recover is based on injury by accident, the employment need not be the sole causative force to render an injury compensable.

"[If the employee] by reason of constitutional infirmities is predisposed to sustain injuries while engaged in labor, nevertheless the leniency and humanity of the law permit him to recover compensation if the physical aspects of the employment contribute in some reasonable degree to bring about or intensify the condition which renders him susceptible to such accident and consequent injury."

*Hansel v. Sherman Textiles*, 304 N.C. 44, 52, 283 S.E.2d 101, 106 (1981) (quoting *Vause v. Equipment Co.*, 233 N.C. 88, 92, 63 S.E. 2d 173, 176 (1951)). As a result, even if preexisting carpal tunnel syndrome contributed to the pain that Plaintiff suffered as a result of the accident, that fact would not render her injury noncompensable.

### III. Conclusion

Thus, for the reasons set forth above, we conclude that none of Defendants' challenges to the Commission's order have merit.<sup>4</sup> As a result, the Commission's order should be, and hereby is, affirmed.

AFFIRMED.

Judges ROBERT N. HUNTER, JR., and McCULLOUGH concur.

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4. Having declined to reverse the Commission's order on compensability-related grounds, we need not reach Defendants' argument concerning the extent, if any, to which we should order further proceedings on remand in light of the Commission's alleged error.

**PENDER v. LAMBERT**

[225 N.C. App. 390 (2013)]

WENDY SUE PENDER, EXECUTRIX OF THE ESTATE OF  
ROCHELLE BOSWELL PENDER, PLAINTIFF

v.

JOSHUA MAX LAMBERT, SEAN RESPASS; WAL-MART STORES EAST, LP,  
WAL-MART STORES, INC., AND WAL-MART ASSOCIATES, INC., DEFENDANTS

No. COA12-714

Filed 5 February 2013

**1. Appeal and Error—interlocutory orders—workers’ compensation—exclusivity provisions—substantial right**

Plaintiff’s appeal from the trial court’s interlocutory order granting summary judgment to defendants in a wrongful death action was immediately appealable where defendants asserted immunity under the Worker’s Compensation Act.

**2. Wrongful Death—Workers’ Compensation Act—exclusivity provisions—Woodson exception—inapplicable**

The trial court did not err in a wrongful death action by granting defendant Wal-Mart Associates’ motion to dismiss. The record did not reflect any employer misconduct and the *Woodson* exception to the exclusivity provisions of the Workers’ Compensation Act was inapplicable.

**3. Wrongful Death—Workers’ Compensation Act—exclusivity provisions—Pleasant exception—inapplicable**

The trial court did not err in a wrongful death action by granting defendants’ motion to dismiss. The *Pleasant* exception to the exclusivity provisions of the Workers’ Compensation Act did not apply where defendant Respess’ conduct did not rise to the level of willful, wanton, or reckless behavior.

**4. Wrongful Death—Workers’ Compensation Act—exclusivity provisions—employers protected**

The trial court did not err in finding that defendants Wal-Mart East and Wal-Mart Stores Inc. were protected by the exclusivity of remedy provision contained within the Workers’ Compensation Act. East and Stores Inc. directly manage and supervise employees hired by Wal-Mart Associates and thus are afforded protection under the Act.



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Appeal by plaintiff from orders entered 23 February 2012 and 27 February 2012 by Judge Clifton W. Everett, Jr. in Wilson County Superior Court. Heard in the Court of Appeals 27 November 2012.

*Earl Taylor, Jr., for plaintiff.*

*Brown, Crump, Vanore & Tierney, LLP, by Michael W. Washburn, for defendant.*

*Newton & Lee, PLLC, by E.S. “Buck” Newton, III, for defendant.*

ELMORE, Judge.

On 7 July 2011, Wendy Sue Pender (plaintiff), executrix of the estate of Rochelle Boswell Pender (the decedent), initiated this wrongful death action against Joshua Lambert (Lambert) and Sean Respass (Respass) as individuals. Additionally, plaintiff brought suit against Wal-Mart Stores East, LP (East); Wal-Mart Stores, Inc. (Stores Inc.), and Wal-Mart Associates, Inc. (Wal-Mart Associates), collectively referred to as “the Wal-Mart defendants.” The Wal-Mart defendants and Respass filed separate motions for summary judgment, which were granted. Plaintiff now appeals. After careful consideration, we affirm.

### **I. Background**

The decedent and Respass were hired by Wal-Mart Associates, the company responsible for employing all Wal-Mart associates, to work at a Wilson, North Carolina Wal-Mart. On 18 May 2011, both employees reported to work. Respass was employed as a loss prevention associate; his duties included the detection and apprehension of suspected shoplifters. Respass testified that all loss prevention associates were expected to reach a goal or “quota” of eight apprehensions per month. This “quota” was not provided for in a written policy but communicated to him by his supervisor. Failure to meet the purported quota could result in verbal warnings or transfer to a different department. Additionally, Wal-Mart implemented a written policy requiring all loss prevention associates to (1) never chase a shoplifter more than ten feet (no-chase policy) and (2) to never engage in a physical confrontation with a customer or shoplifter. The purpose of said policy was to ensure the safety of all persons on Wal-Mart’s premises.

During his shift, Respass suspected Lambert of shoplifting and asked Lambert to follow him to the back of the store for further inves-

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tigation. Lambert agreed. Once they reached the back, Lambert turned and sprinted toward the entrance. Respass proceeded to chase Lambert, thus violating the no-chase policy. As the two neared the entrance, they collided with the decedent, a Wal-Mart greeter, knocking her to the floor. As a result of the collision, the decedent sustained a fatal head injury. Thereafter, Wal-Mart Associates terminated Respass for violating its no-chase policy.

**II. Arguments****A. Interlocutory Order**

[1] Plaintiff acknowledges that this appeal stems from an interlocutory order. However, plaintiff maintains that this appeal is properly before this Court as the trial court's order granting the Wal-Mart defendants' and Respass' motions for summary judgment affects a substantial right.

An interlocutory order is immediately appealable when "the challenged order affects a substantial right." N.C.R. App. P. 28(b)(4) (2012). "Whether an interlocutory appeal affects a substantial right is determined on a case by case basis." *McConnell v. McConnell*, 151 N.C. App. 622, 625, 566 S.E.2d 801, 803 (2002) (citation omitted). "The appellants must present more than a bare assertion that the order affects a substantial right; they must demonstrate *why* the order affects a substantial right." *Hoke Cty. Bd. Of Educ. v. State*, 198 N.C. App. 274, 277-78, 679 S.E.2d 512, 516 (2009) (citation omitted) (emphasis in original). "Where the dismissal of an appeal as interlocutory could result in two different trials on the same issues, creating the possibility of inconsistent verdicts, a substantial right is prejudiced and therefore such dismissal is immediately appealable." *Estate of Harvey v. Kore-Kut, Inc.*, 180 N.C. App. 195, 198, 636 S.E.2d 210, 212 (2006).

In the instant case, plaintiff contends that there is a possibility of inconsistent verdicts as to the parties' liability if this appeal is delayed. Plaintiff cites *Burton v. Phoenix Fabricators & Erectors, Inc.*, where our Supreme Court held that the trial court's denial of a defendant-employer's motion to dismiss based on asserted immunity under the Worker's Compensation Act "affects a substantial right and will work injury if not corrected before final judgment." 362 N.C. 352, 352, 661 S.E.2d 242, 242-43 (2008). Here, the Wal-Mart defendants and Respass brought separate motions for summary judgment, each asserting immunity under the North Carolina Workers' Compensation Act (the Act). Additionally, on appeal defendants have raised the

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defense of the exclusivity of remedy provision. Should the issue of their liability be tried separately, there is the possibility of inconsistent verdicts. Accordingly, we conclude the trial court's orders in the case *sub judice* affect a substantial right and the appeal is properly before this Court.

**B. Wal-Mart Associates' Motion for Summary Judgment**

**[2]** Plaintiff first argues that there was sufficient evidence to establish a genuine issue of material fact as to Wal-Mart Associates' liability. We disagree.

"Our standard of review of an appeal from summary judgment is de novo; such judgment is appropriate only when the record shows that 'there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law.'" *In re Will of Jones*, 362 N.C. 569, 573, 669 S.E.2d 572, 576 (2008) (quoting *Forbis v. Neal*, 361 N.C. 519, 524, 649 S.E.2d 382, 385 (2007)).

The purpose of the Act is to provide limited benefits to an employee who is injured during the course of his employment regardless of negligence or other fault on the part of the employer. It also serves to limit the liability of the employer if negligence is found. *See Bryant v. Dougherty*, 267 N.C. 545, 549, 148 S.E.2d 548, 553 (1966). The Act contains an exclusivity of remedy provision which provides that

[i]f the employee and the employer are subject to and have complied with the provisions of this Article, then the rights and remedies herein granted to the employee, his dependents, next of kin, or personal representative shall exclude all other rights and remedies of the employee, his dependents, next of kin, or representative as against the employer at common law or otherwise on account of such injury or death.

N.C. Gen. Stat. § 97-10.1 (2012).

In *Woodson v. Rowland* our Supreme Court recognized an exception to the general exclusivity provisions of the Act whereby an employee may pursue a civil action against his employer if the employer "intentionally engage[d] in misconduct knowing it is substantially certain to cause serious injury or death to employees and an employee is injured or killed by that misconduct." (the *Woodson* exception). 329 N.C. 330, 340, 407 S.E.2d 222, 228 (1991).

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We note that “[t]he *Woodson* exception . . . applies only in the most egregious cases of employer misconduct. Such circumstances exist where there is uncontroverted evidence of the employer’s intentional misconduct and where such misconduct is substantially certain to lead to the employee’s serious injury or death.” *Whitaker v. Town of Scotland Neck*, 357 N.C. 552, 557, 597 S.E.2d 665, 668 (2003). In determining whether *Woodson* is applicable, “[o]ur Courts have focused on the ‘substantial certainty’ aspect of the inquiry, not the ‘serious injury’ aspect of the inquiry.” *Cameron v. Merisel, Inc.*, 163 N.C. App. 224, 230, 593 S.E.2d 416, 421 (2004).

Here, plaintiff argues that employer misconduct existed based on (1) the fact that Respass chased Lambert and (2) the implementation of Wal-Mart’s quota system. Plaintiff specifically asserts that the quota system amounted to employer misconduct as it created an “incentive for Respass to engage in conduct (the chase) that was substantially certain to cause serious injury or death[.]”

We disagree with plaintiff. In *Woodson*, the defendant-employer intentionally disregarded known safety regulations and made the decedent-employee enter a dangerously deep trench. As such, the decedent was forced into an obviously hazardous situation where “only one outcome was substantially certain to follow: an injurious, if not fatal, cave-in of the trench.” *Id.* at 557-58, 597 S.E.2d at 668.

Here, superimposed on top of the purported quota system, is Wal-Mart’s no-chase policy. The fact that Wal-Mart Associates has implemented a no-chase policy evidences that it prioritizes the safety of its employees and customers. Wal-Mart Associates terminated Respass for violating this policy, further indicating its commitment to safety. Additionally, the record indicates that no prior injuries have resulted from the imposition of the quota system. As noted above, the *Woodson* exception applies only in the most egregious cases of employer misconduct. *Whitaker, supra*. However, here the record does not evidence any employer misconduct. Thus, the *Woodson* exception is inapplicable and the trial court did not err in granting Wal-Mart Associates’ motion for summary judgment.

**C. Pleasant Exception**

[3] Plaintiff argues that Wal-Mart Associates and Respass remain liable under *Pleasant v. Johnson*. We disagree.

A second exception to the exclusivity of remedy provision was recognized in *Pleasant v. Johnson*, whereby our Supreme Court held

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that an injured employee may maintain an action against a co-employee for acts of willful, wanton, and reckless negligence. *See* 312 N.C. 710, 717, 325 S.E.2d 244, 250 (1985).

The concept of willful, reckless and wanton negligence inhabits a twilight zone which exists somewhere between ordinary negligence and intentional injury. . . . We have described ‘wanton’ conduct as an act manifesting a reckless disregard for the rights and safety of others.’ The term ‘reckless’, as used in this context, appears to be merely a synonym for ‘wanton[.]’. . . ‘[W]illful negligence’ has been defined as the intentional failure to carry out some duty imposed by law or contract which is necessary to the safety of the person or property to which it is owed.

312 N.C. at 714-15, 325 S.E.2d at 247-48.

Engaging in willful, wanton, and reckless behavior is akin to the commission of an intentional tort, and, as such, the employee must form the constructive intent to injure. *See Id.* at 717, 325 S.E.2d at 249. Such intent “exists where conduct threatens the safety of others and is so reckless or manifestly indifferent to the consequences that a finding of willfulness and wantonness equivalent in spirit to actual intent is justified.” *Cameron*, 163 N.C. App. 224, 228, 593 S.E.2d 416, 420 (2004) (citation omitted). Alternatively, when an employee is injured by the ordinary negligence of a co-employee, the Act is the exclusive remedy. *See Pleasant* at 713, 325 S.E. 2d at 247.

Plaintiff first alleges that *employer* Wal-Mart Associates remains liable under *Pleasant* per the doctrine of respondeat superior. However, plaintiff cites no relevant supporting authority for this argument. Accordingly, we decline to address it.

Plaintiff next contends that Respass remains personally liable because he “carelessly, recklessly, and heedlessly” chased Lambert and “attempted to make a leaping, flying tackle” when apprehending him. However, we are not persuaded that Respass’ conduct rose to the level of willful, wanton, or reckless behavior. Respass testified that (1) Lambert threw the decedent into his path, (2) he slowed his pace before coming into contact with the decedent, (3) he did not believe that his impact caused the decedent to fall, and (4) Lambert caused the fall. Moreover, the record indicates that Respass engaged in a foot-chase and accidentally collided with a co-employee; such

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conduct does not evidence a reckless or manifest disregard for the consequences so as to warrant a finding of willfulness and wantonness equivalent in spirit to actual intent. *See Cameron, supra*. As such, we cannot hold that Respass formed the requisite constructive intent for the *Pleasant* exception to apply. Accordingly, we conclude that the trial court properly granted Respass' motion for summary judgment.

**D. Exclusive remedy and the Act.**

[4] Finally, plaintiff argues that the trial court erred in finding that East and Stores Inc. are protected by the exclusivity of remedy provision contained within the Act. We disagree.

Under the Act, "where an employee's injury or death is compensable the sole remedy against the employer and '*those conducting his business*' is that provided by its terms." *Weaver v. Bennett*, 259 N.C. 16, 20, 129 S.E.2d 610, 613 (1963) (quoting N.C. Gen. Stat. § 97-9) (emphasis added). "[T]hose conducting [the employer's] business" is a phrase which should be liberally construed. *See Hamby v. Profile Prods., L.L.C.*, 361 N.C. 630, 635, 652 S.E.2d 231, 234 (2007). "Previously, this Court has found certain individuals and entities, though distinct from the employer, still within the scope of the Act's exclusivity provision." *Id.* at 636, 652 S.E.2d at 235.

Plaintiff specifically argues that East and Stores Inc. are not afforded protection under the Act because neither is the decedent's employer. As such, plaintiff asserts that a common law negligence action remains against these two defendants under the agency principles set forth in the doctrine of respondent superior.

Plaintiff's argument is misguided and contradictory. First, plaintiff seeks a conclusion that these defendants are not subject to the Act because they are not the decedent's employers. Next, plaintiff asserts that East and Stores Inc. remain vicariously liable for the negligent acts of their agent.

In any event, we conclude that both East and Stores Inc. are subject to the exclusivity of remedy provision under the Act. Here, East owns and *operates* the Wilson, North Carolina Wal-Mart. As part of the store's operation, East enforces the quota system. Accordingly, in his capacity as an asset protection associate, Respass was conducting East's business. Furthermore, plaintiff concedes this, stating that "at the time he was chasing Defendant-Lambert, Defendant-Respass considered himself to be protecting the assets of Wal-Mart (i.e. Wal-Mart East and Defendant Wal-Mart Stores)."

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Stores Inc. serves as Wal-Mart's overall parent company. As such, it oversees marketing operations and contracts with vendors. Additionally, Stores Inc. manages the asset protection division and is ultimately responsible for the supervision of all asset protection associates.

As noted above, the protection afforded by the exclusivity of remedy provision stems to both employers and *those conducting his business*. Here, East and Stores Inc. directly manage and supervise employees hired by Wal-Mart Associates and thus are afforded protection under the Act.

### **Conclusion**

In sum, Wal-Mart Associates is not liable to plaintiff under *Woodson* and Respass is not liable under *Pleasant*. Additionally, East and Stores Inc. are protected by the exclusivity of remedy provision set forth in the Act. Accordingly, the trial court did not err in granting Respass' and the Wal-Mart defendants' motions for summary judgment. After careful consideration, we affirm.

Affirmed.

Judges McGEE and HUNTER, Robert C. concur.

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RAMEY KEMP & ASSOCIATES, INC., PLAINTIFF-APPELLEE  
v.  
RICHMOND HILLS RESIDENTIAL PARTNERS, LLC; FIRST BANK AND FIRST TROY  
SPE, LLC, DEFENDANTS-APPELLANTS AND THIRD PARTY PLAINTIFFS  
v.  
STEVE SAIEED, THIRD-PARTY DEFENDANT

No. COA12-121

Filed 5 February 2013

### **1. Liens—filing claim of lien—last furnished labor or materials—no genuine issue of material fact**

The trial court did not erroneously grant summary judgment in favor of Plaintiff on its claim of lien. Plaintiff offered evidence that it had filed its claim of lien well within the statutorily-specified 120 days of the date upon which it last furnished labor or materials under the relevant contract and Defendants failed to adduce admissible evidence demonstrating the existence of a genuine

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issue of material fact concerning the date upon which Plaintiff last provided services.

**2. Liens—claim of lien—contract—making of an improvement to land**

The trial court did not err by granting summary judgment in favor of Plaintiff on a claim of lien as the work performed by Plaintiff under its contract with defendant Richmond Hill involved the making of an improvement to land.

Judge McGee dissenting.

*Appeal by defendants from order entered 3 October 2011 by Judge R. Allen Baddour, Jr. in Wake County Superior Court. Heard in the Court of Appeals 5 June 2012.*

*Manning Fulton & Skinner, P.A., by William C. Smith, Jr. and Natalie M. Rice, for Plaintiff-Appellee.*

*Boxley, Bolton, Garber & Haywood, L.L.P., by Ronald H. Garber, for Defendants-Appellants First Bank and First Troy SPE, LLC.*

ERVIN, Judge.

Defendants First Bank and First Troy, SPE, LLC, appeal from an order granting summary judgment in favor of Plaintiff Ramey Kemp & Associates, Inc., with respect to its breach of contract, *quantum meruit*, and lien enforcement claims. On appeal, Defendants contend that the trial court erred by entering summary judgment in Plaintiff's favor on the grounds that Plaintiff failed to file a claim of lien within 120 days of the date upon which it last furnished labor or materials under the relevant contract and that the work that Plaintiff performed lacked the necessary nexus to an improvement to real property. After careful consideration of Defendants' challenges to the trial court's order in light of the record and the applicable law, we conclude that the trial court's order should be affirmed.

I. Background

A. Substantive Facts

On 10 August 2005, Plaintiff entered into a "contract at the request of Steve Saieed, [an] authorized representative of Richmond Hills Residential Partners, LLC," under which Plaintiff was obligated to furnish "labor, materials and equipment necessary to complete pro-



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fessional design services in regards to traffic engineering services,” including, but “not limited to, preparing design plans, pavement marking and signing plans, drainage, sedimentation and erosion control designs, driveway designs, signal designs and encroachment agreement[s]” for a project under development by Richmond Hills. The services that Plaintiff performed “were not piecemeal and subject to separate contracts or work orders, but constituted a single Contract, and all work was identified by the same Ramey Kemp Project Number (05128.0).”<sup>1</sup>

Pursuant to the terms of this contract, Plaintiff performed various services which were primarily intended to assist Richmond Hills in obtaining the necessary driveway permits for the proposed development. “[T]he project stopped when the economy fell apart,” an event which had occurred by January, 2009. On 16 January 2009, the North Carolina Department of Transportation voided the permits authorizing the construction of one of the driveways providing access to the development due to the low level of construction activity occurring at that location. Plaintiff was “paid on this project up until January 28, [2009.]” However, Plaintiff “continued to do work from then through February of 2010” despite the fact that it did not receive payment for these additional services. “The last work performed by Plaintiff on the property was at the specific request of Steve Saieed on behalf of Richmond Hills” in February 2010 and included a “status report on outstanding or unresolved issues such as roadway improvements, driveway permits, and control-of-access agreements to facilitate a sale of the property.” In other words, Mr. Saieed had requested that the February 2010 letter be prepared because another person or entity was interested in purchasing the property and because such a letter was needed for the purpose of marketing the property that Richmond Hills had intended to develop.

As part of the process of funding the development of the proposed project, Richmond Hills obtained a loan from First Bank in the amount of \$7,750,000.00. In return, Richmond Hills executed a deed of trust applicable to the property on which the development was to be located in favor of First Bank for the purpose of securing the loan.

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1. Although our dissenting colleague questions our recitation of information contained in an affidavit filed by one of Plaintiff’s officers in this statement of the facts on the grounds that the extent to which the present case involves two contracts, rather than a single contract, is disputed, we do not, for the reasons set forth in more detail below, believe that the number of contracts at issue in this case is, in fact, in genuine dispute given the uncontradicted record evidence.

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After Richmond Hills defaulted on its obligation to First Bank, First Bank purchased the property at a foreclosure sale on 26 February 2010. On 26 June 2010, First Bank conveyed the property to Defendant First Troy.

### B. Procedural History

On 30 March 2010, Plaintiff filed a claim of lien against the Richmond Hills property in which it asserted that it had last provided labor or materials for the proposed project on 24 February 2010. On 19 August 2010, Plaintiff filed a verified complaint against Richmond Hills, First Bank, and First Troy in which it asserted claims for breach of contract, *quantum meruit*, and enforcement of its lien claim. On 14 December 2010, First Bank and First Troy filed an unverified answer in which they denied the material allegations of Plaintiff's complaint. In addition, First Bank and First Troy asserted a third-party complaint against Mr. Saieed in which they (1) alleged that Mr. Saieed had filed an affidavit in which he falsely represented that there were no outstanding debts that might give rise to a claim of lien on the property; (2) sought indemnification for any judgment that Plaintiff might obtain against them arising from Plaintiff's claim of lien; and (3) asserted that they were entitled to recover damages from Mr. Saieed pursuant to N.C. Gen. Stat. § 75-1.1.

On 25 May 2011, an entry of default was made against Richmond Hills. On the same date, Plaintiff filed a motion seeking the entry of summary judgment in its favor against First Bank and First Troy and the entry of a default judgment against Richmond Hills. An affidavit executed by Montell Irvin, the president of Ramey Kemp, and various invoices and other documents were attached to Plaintiff's motion. On 25 August 2011, Defendants filed a response to Plaintiff's motion, which was accompanied by Mr. Irvin's deposition and various documentary exhibits, including a 27 January 2009 letter from the North Carolina Department of Transportation voiding the "approved driveway permit application package" due to inactivity. On 3 October 2011, the trial court entered an order granting Plaintiff's motion for summary judgment and entering default judgment against Richmond Hills. First Bank and First Troy noted an appeal to this Court from the trial court's order granting summary judgment in Plaintiff's favor.<sup>2</sup>

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2. As a result of the fact that the record on appeal failed to establish that Defendants' third party complaint against Mr. Saieed had been resolved, this Court filed an unpublished opinion on 18 September 2012 dismissing Defendants' appeal as having

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## II. Legal Analysis

### A. Standard of Review

Summary judgment is properly granted “if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law.” N.C. Gen. Stat. § 1A-1, Rule 56(c). “All inferences of fact from the proofs offered at the hearing must be drawn against the movant and in favor of the party opposing the motion.” *Boudreau v. Baughman*, 322 N.C. 331, 343, 368 S.E.2d 849, 858 (1988) (citing *Page v. Sloan*, 281 N.C. 697, 706, 190 S.E.2d 189, 194 (1972)). “A party moving for summary judgment may prevail if it meets the burden (1) of proving an essential element of the opposing party’s claim is nonexistent, or (2) of showing through discovery that the opposing party cannot produce evidence to support an essential element of his or her claim.” *Lowe v. Bradford*, 305 N.C. 366, 369, 289 S.E.2d 363, 366 (1982) (citations omitted). “[O]nce the party seeking summary judgment makes the required showing, the burden shifts to the nonmoving party to produce a forecast of evidence demonstrating specific facts, as opposed to allegations, showing that he can at least establish a *prima facie* case at trial.” *Gaunt v. Pittaway*, 139 N.C. App. 778, 784-85, 534 S.E.2d 660, 664, *disc. review denied*, 353 N.C. 262, 546 S.E.2d 401 (2000), *cert. denied*, 353 N.C. 371, 547 S.E.2d 810, *cert. denied*, 534 U.S. 950, 122 S. Ct. 345, 151 L. Ed. 2d 261 (2001). A trial court’s decision to grant summary judgment is reviewed on a *de novo* basis. *Va. Electric and Power Co. v. Tillett*, 80 N.C. App. 383, 385, 343 S.E.2d 188, 191, *cert. denied*, 317 N.C. 715, 347 S.E.2d 457 (1986).

According to N.C. Gen. Stat. § 1A-1, Rule 56(e), “[s]upporting and opposing affidavits [proffered in connection with a summary judgment motion] shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. . . .” Put another way:

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been taken from an unappealable interlocutory order. *Ramey Kemp & Assocs. v. Richmond Hills Residential Partners, LLC*, \_\_\_ N.C. App. \_\_\_, 731 S.E.2d 863 (2012) (2012 N.C. App. LEXIS 1109). On 27 September 2012, Defendants filed a petition for the issuance of a writ of *certiorari* and a motion seeking leave to amend the record so as to include a copy of an order entering default judgment against Mr. Saieed. On 4 October 2012, we entered orders allowing Defendants’ amendment motion, withdrawing our previous opinion, instructing the Clerk of this Court not to certify that opinion, and denying Defendants’ *certiorari* petition as moot. *Ramey Kemp & Assocs. v. Richmond Hills*, \_\_\_ N.C. App. \_\_\_, \_\_\_ S.E.2d \_\_\_ (2012 N.C. App. LEXIS 1150) (unpublished).

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“affidavits or other material offered which set forth facts which would not be admissible in evidence should not be considered when passing on the motion for summary judgment.” “Hearsay matters included in affidavits should not be considered by a trial court in entertaining a party’s motion for summary judgment. Similarly, a trial court may not consider that portion(s) of an affidavit which is not based on an affiant’s personal knowledge.” . . . “A verified complaint may be treated as an affidavit if it (1) is made on personal knowledge, (2) sets forth such facts as would be admissible in evidence, and (3) shows affirmatively that the affiant is competent to testify to the matters stated therein.”

*Wein II, LLC v. Porter*, 198 N.C. App. 472, 476-77, 683 S.E.2d 707, 711 (2009) (quoting *Strickland v. Doe*, 156 N.C. App. 292, 295, 577 S.E.2d 124, 128-29, *disc. review denied*, 357 N.C. 169, 581 S.E.2d 447 (2003) (internal citation omitted); *Moore v. Coachmen Industries, Inc.*, 129 N.C. App. 389, 394, 499 S.E.2d 772, 776 (1998); and *Page v. Sloan*, 281 N.C. 697, 705, 190 S.E.2d 189, 194 (1972) (citing N.C. Gen. Stat. § 1A-1, Rule 56(e)). As a result, while the trial court was entitled to consider the factual allegations in Plaintiff’s verified complaint in ruling on Plaintiff’s summary judgment motion, the same is not true of Defendants’ responsive pleading, which was not verified.

A careful reading of Defendants’ brief indicates that Defendants have not argued that the record disclosed the existence of any genuine issue of material fact. According to well-established North Carolina law:

Appellate review is limited to those questions “clearly” defined and “presented to the reviewing court” in the parties’ briefs, in which “arguments and authorities upon which the parties rely in support of their respective positions” are to be presented. See N.C.R. App. P. 28(a)[.] . . . “It is not the role of the appellate courts . . . to create an appeal for an appellant,” nor is it “the duty of the appellate courts to supplement an appellant’s brief with legal authority or arguments not contained therein.”

*First Charter Bank v. Am. Children’s Home*, 203 N.C. App. 574, 580, 692 S.E.2d 457, 463 (2010) (quoting *Viar v. N.C. Dep’t of Transp.*, 359 N.C. 400, 402, 610 S.E.2d 360, 361 (2005), and *State v. Hill*, 179 N.C.

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App. 1, 21, 632 S.E.2d 777, 789 (2006)).<sup>3</sup> As a result, the only issue raised by Defendant's challenge to the trial court's order is the extent to which the trial court properly applied the applicable law to the uncontradicted evidence.

B. Date of Last Furnishing of Labor or Materials

[1] As an initial matter, Defendants claim that the trial court erroneously granted summary judgment in favor of Plaintiff because Plaintiff failed to file its claim of lien in a timely manner. Defendants contend that Plaintiff was not entitled to treat the February 2010 letter as the date upon which services were last furnished to Richmond Hills for purposes of evaluating the timeliness of its claim of lien. We do not find Defendants' argument persuasive.

N.C. Gen. Stat. § 44A-12(b) provides that "[c]laims of lien on real property may be filed at any time after the maturity of the obligation secured thereby but not later than 120 days after the last furnishing of labor or materials at the site of the improvement by the person claiming the lien." The undisputed evidence contained in the present record establishes that Plaintiff entered into a contract with Richmond Hills on 10 August 2005. Mr. Irvin testified in his deposition that Plaintiff continued to perform work under that contract until 24 February 2010. More specifically, Mr. Irvin asserted in his affidavit that (1) Plaintiff's "work often spans months or even years in a given development, sometimes with long gaps between service"; (2) the "parties in this case intended that such services would be provided for this development as a single seamless contract"; (3) the "services Ramey Kemp . . . provided to this developer[,] in particular, were not piecemeal and subject to separate contracts or work orders, but con-

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3. Our dissenting colleague argues, in essence, that there is a genuine issue of material fact concerning the contents of the original agreement between the parties and whether the present record shows the existence of one contract, rather than two. Although a genuine evidentiary dispute between the parties concerning the number of contracts between the various parties would, in fact, suffice to preclude summary judgment in favor of Plaintiff, there is no direct evidence that the February 2010 letter was written pursuant to a separate contract between Plaintiff and Cape Fear Land Managers, LLC, which appears to be a separate business in which Mr. Saieed was also involved, rather than the 2005 contract between Plaintiff and Richmond Hill. Instead, our dissenting colleague appears to take the position that one can infer from the undisputed evidentiary facts that Plaintiff's invoices were issued pursuant to two contracts rather than one. As a result, we do not believe that the argument advanced by our dissenting colleague rests upon a contention that the record discloses the existence of genuine issues concerning disputed evidentiary facts and believe that our colleague's argument rests, instead, upon inferences which our colleague thinks can appropriately be drawn from the undisputed evidentiary facts.

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stituted a single [c]ontract,” with all work being “identified by the same Ramey Kemp Project Number (05128.0);” and (4) the “last work performed by Plaintiff on the property was at the specific request of Steve Saieed on behalf of Richmond Hills” and “included tasks that would have been contemplated, expected, and required in a project such as this one.” We conclude that this evidence, which is not contradicted by any other admissible evidence, clearly establishes that the last date upon which Plaintiff provided labor or materials to the project under its contract with Richmond Hills was 24 February 2010. As a result, given that Plaintiff filed a claim of lien applicable to the property on 30 March 2010, that filing was made well within the statutorily-specified 120 day period.

The presentation of the evidence outlined in the preceding paragraph shifted the burden of production to Defendants to adduce admissible evidence, as compared to mere speculation or conclusory assertions, demonstrating the existence of a genuine issue of material fact concerning the date upon which Plaintiff last provided services relating to the project under its contract with Richmond Hill. Defendants did not adduce such evidence. Instead, Defendants argue that the undisputed evidence establishes that the work upon which Plaintiff relies in support of its assertion that it last furnished work to Richmond Hills on 24 February 2010 resulted from “a separate contract between Ramey and Cape Fear Land Managers LLC” instead of having been performed under the initial contract between Plaintiff and Richmond Hills. After carefully reviewing the record, we conclude that this argument lacks both legal and evidentiary support given the facts disclosed in the present record.

As an initial matter, Mr. Irvin explicitly stated in his affidavit that the report in question was prepared at Mr. Saieed’s request under the original contract and that the preparation of such a report was consistent with the scope of the work to be performed by Plaintiff under the original contract. Defendants argue that the February 2010 report, which was prepared in order to facilitate a sale of the property on which the development was supposed to be completed, was prepared after the work contemplated under the original contract between Plaintiff and Richmond Hills had already been completed, with this assertion based on the fact that Richmond Hills had ceased work on the development due to the existence of financial problems prior to 24 February 2010. These arguments ignore Mr. Irvin’s testimony con-

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cerning the scope of the work contemplated in the original contract, which would encompass a report of the type at issue here.<sup>4</sup>

In addition, Defendants direct our attention to the fact that the 25 February 2010 invoice was sent to Mr. Saieed c/o Cape Fear Land Managers LLC. However, the uncontradicted evidence contained in the present record indicates that, throughout the contract period, Plaintiff consistently sent invoices for the work performed under its contract with Richmond Hills to Mr. Saieed c/o Cape Fear Land Managers LLC. In other words, the invoice relating to the February 2010 report did not differ from Plaintiff's earlier invoices, precluding us from inferring the existence of a new or "second" contract from the manner in which the invoice was addressed.<sup>5</sup>

Finally, Defendants stress that the work upon which Plaintiff relies to establish a date of last furnishing was performed more than a year after the last prior occasion on which Plaintiff had performed work for Richmond Hill. However, Mr. Irvin stated in his affidavit that

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4. In reaching a different conclusion, our dissenting colleague emphasizes the existence of evidence tending to show some uncertainty as to whether the parties ever entered into a written contract and the fact that the preparation of a report was not included in the description of the "basic" contours of the work that Plaintiff originally agreed to perform for Richmond Hills. However, the record contains no indication that there was a written agreement that differed in any way from the description of the scope of the contract described by Mr. Irvin or that Mr. Irvin lacked personal knowledge of the scope of the parties' agreement. In addition, nothing in the evidence provided by Mr. Irvin tends to suggest that the overall scope of the work to be performed under the contract was limited to the achievement of the parties' "basic" goals. Finally, the alleged limitations in Mr. Irvin's knowledge to which our dissenting colleague alludes for the purpose of attempting to establish "potential contradict[i]ons" in his testimony relate to the administration of the underlying contract rather than to the origin and scope of that agreement. As a result, we do not believe that any of these arguments support reversal of the trial court's order.

5. Our dissenting colleague emphasizes the absence of any mention of Richmond Hills in the address used in the cover letter associated with the invoice relating to the work involved in the preparation of the February 2010 letter and the fact that Cape Fear was shown as the applicant for the requested driveway permit on certain documents sent to the North Carolina Department of Transportation as further support for her contention that the record would support a finding that the February 2010 letter was sent pursuant to a second contract between Plaintiff and Cape Fear. However, given that all of the invoices that Plaintiff sent relating to services provided with respect to the property on which the development was to be constructed were identical; given that the invoice, rather than the cover letter, is the operative document for billing purposes; and given that the record is devoid of any evidence affirmatively tending to show the existence of a second contract between Plaintiff and Cape Fear relating to the February 2010 letter, we do not believe that the additional factors upon which our dissenting colleague relies provide any substantive basis for inferring that there were two, rather than one, contracts relating to the property in question.

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Plaintiff's "work often spans months or even years in a given development, sometimes with long gaps between service, given that such projects are often temporarily suspended and delayed by various events." Defendant did not adduce any evidence that contradicted this assertion. As a result, for the reasons set forth above, we conclude that Defendants' "two contract" theory, with which our dissenting colleague agrees, lacks adequate evidentiary support.

In their brief, Defendants place substantial reliance on the Supreme Court's decision in *Priddy v. Lumber Co.*, 258 N.C. 653, 129 S.E.2d 256 (1963). In *Priddy*, the defendant supplied materials required for the construction of a residence. After the completion of the necessary construction work, the defendant twice made unnecessary trivial purchases for the express purpose of extending the period of time within which a claim of lien might lawfully be filed. In holding that these purchases did not suffice to extend the time within which a claim of lien could properly be filed, the Supreme Court stated that:

"[T]he time for filing a claim in a mechanic's lien proceeding is computed from the date when the last item of work labor or materials is done, performed or furnished[.] . . . But the work performed and materials furnished must be required by the contract, and whatever is done must be done in good faith for the purpose of fully performing the obligations of such contract, and not for the mere purpose of extending the time for filing lien proceedings." . . . Furthermore, . . . the work or materials at different times [must] be furnished under one continuous contract. Where the time allowed for filing a lien has begun to run, the claimant cannot thereafter extend the time within which the lien may be filed by doing or furnishing small additional items for that purpose.

*Priddy*, 258 N.C. at 656-57, 129 S.E.2d at 260 (quoting *Beaman v. Hotel Corp.*, 202 N.C. 418, 422-23, 163 S.E. 117, 119 (1932) (other citations omitted)). As a result, *Priddy* "enunciated the following criteria for determining when the materials were last furnished for purposes of filing a materialmens lien:

- (i) the work performed and materials furnished must be required by the contract
- (ii) . . . the work or materials at different times [must] be furnished under one continuous contract



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(iii) whatever is done must be done in good faith for the purpose of fully performing the obligations of the contract, and not for the mere purpose of extending the time for filing lien proceedings and, finally

(iv) where the time allowed for filing has begun to run, the claimant cannot thereafter extend the time within which the lien may be filed by doing or furnishing small additional items for that purpose.

*Blalock Electric Co. v. Grassy Creek Development Corp.*, 99 N.C. App. 440, 447, 393 S.E.2d 354, 358 (1990) (citing *Priddy*, 258 N.C. at 657, 129 S.E.2d at 260). In analyzing these factors and determining the manner in which this case should be resolved, we find it useful to compare the facts at issue in *Blalock* with those at issue in *Priddy*.

In *Blalock*, the plaintiff, an electrical contractor, performed a substantial amount of electrical work on two condominiums, for which it was paid. Subsequently, Plaintiff stopped working on the project because “defendant was without funds to proceed with construction.” *Blalock*, 99 N.C. App at 442, 393 S.E.2d at 355. Some months later, at the defendant’s request, the plaintiff performed additional work on the project. On appeal, the defendant argued, in reliance on *Priddy*, that “the [trial] court erred in finding that the labor and materials supplied by plaintiff . . . were not trivial in nature and were performed in furtherance of the original contractual obligation.” *Blalock* at 444, 393 S.E.2d at 356. In rejecting this argument, we held that the record supported a finding that the work was performed under the original contract and that “there [was] no indication that the work . . . was done for the purpose of extending the time for filing the lien.” *Blalock* at 447, 393 S.E.2d at 358.

The facts contained in the present record resemble those at issue in *Blalock* more closely than those at issue in *Priddy*. More specifically, Plaintiff’s evidentiary showing indicated that Mr. Saieed requested production of a report detailing the status of the driveway permitting process, which had been the principal issue addressed in the earlier work that Plaintiff performed for Richmond Hills. In addition, the undisputed record evidence tends to show that Mr. Saieed had served as Richmond Hill’s contact with Plaintiff throughout the history of the project and that the invoice associated with this report had the same project number as all of the earlier invoices that Plaintiff had sent to Richmond Hills stemming from work performed in furtherance of this project. As the Supreme Court noted in

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*Beaman*, “[w]here a service is performed or material furnished at the request of the owner, it will extend the time for claiming a lien or will revive an expired lien, as to a contract . . . substantially completed.” *Beaman*, 202 N.C. at 422, 129 S.E.2d at 119 (citation omitted). Finally, Defendants adduced no evidence that the report upon which Plaintiff relies stemmed from any sort of collusion or bad faith. As a result, none of Defendants’ challenges to the trial court’s decision predicated on the timeliness of Plaintiff’s lien claim have any merit.

### C. Improvement of Land

**[2]** Secondly, Defendants argue that the trial court erred by granting summary judgment in favor of Plaintiff on the grounds that the report prepared by Plaintiff in February 2010 “did not go toward making an improvement to the land as required by [N.C. Gen. Stat.] § 44A-8.” This argument lacks merit.

N.C. Gen. Stat. § 44A-8 provides, in pertinent part, that a lien claim may be filed by “[a]ny person who performs or furnishes labor or professional design or surveying services or furnishes materials or furnishes rental equipment pursuant to a contract, either express or implied, with the owner of real property for the making of an improvement thereon.” According to Defendants, the report that Plaintiff prepared in February 2010 in connection with the proposed development did not contribute to the making of an improvement on the real property and was, for that reason, insufficient to support the filing of a claim of lien. Defendant’s argument overlooks N.C. Gen. Stat. § 44A-7, which provides, in pertinent part, that:

Unless the context otherwise requires in this Article:

(1) “Improve” means to build, effect, alter, repair, or demolish any improvement upon, connected with, or on or beneath the surface of any real property, or to excavate, clear, grade, fill or landscape any real property, or to construct driveways and private roadways, . . . and shall also mean and include any design or other professional or skilled services furnished by architects, engineers, [or] land surveyors[.] . . .

(2) “Improvement” means all or any part of any building, . . . alteration, demolition, excavation, clearing, grading, filling, or landscaping, including trees and shrubbery, driveways, and private roadways, on real property.

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As we have already noted, Plaintiff contracted with Richmond Hill to “provide all services relating to design, engineering, planning, and permit acquisition for roadways and driveways for development of the real property owned by Richmond Hills[.]” Although Defendants do not deny that the work described in this portion of the contract between Plaintiff and Richmond Hills comes within the statutory definition of an “improvement” to real property, they argue that the specific task that Plaintiff performed on 24 February 2010 did not directly result and was not intended to result in any improvement to the real property upon which Richmond Hill’s project was to be developed. In advancing this argument, Defendants rely upon the same “second contract” theory which we have already found to be lacking in merit. As a result, we necessarily reject Defendants’ contention that the work performed by Plaintiff under its contract with Richmond Hill did not involve the making of an improvement to land.

### III. Conclusion

Thus, for the reasons set forth above, we conclude that the trial court did not err by entering summary judgment in Plaintiff’s favor.<sup>6</sup> As a result, the trial court’s order should be, and hereby is, affirmed.

AFFIRMED.

Judge STEELMAN concurs.

Judge McGee dissents in separate opinion.

McGEE, Judge, dissenting.

For reasons that follow, I respectfully dissent.

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6. Our dissenting colleague suggests that there are genuine issues of material fact arising from questions about the credibility of and weight to be given to Mr. Irvin’s testimony. However, summary judgment is appropriate, even in favor of a party with the burden of proof, when “there are only latent doubts as to the affiant’s credibility,” when the non-moving party fails to present any evidentiary materials that create a direct factual conflict, when the non-moving party “fail[s] to point to specific areas of impeachment or contradiction,” and when the non-moving party fails to utilize the procedures available pursuant to N.C. Gen. Stat. § 1A-1, Rule 56(f). *Kidd v. Earley*, 289 N.C. 343, 370, 222 S.E.2d 392, 410 (1976). In view of the fact that our dissenting colleague has failed to point out any specific basis for challenging the credibility of or weight to be given to the evidence provided by Mr. Irvin other than the limitations upon the extent of Mr. Irvin’s knowledge and given that these limitation do not, for the reasons set forth earlier, provide any basis for questioning his knowledge of the scope of the work required under the 2005 contract, we do not believe that summary judgment should have been denied based on weight and credibility considerations.

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I. Additional Facts.

Plaintiff continued to provide services to Richmond Hills until February 2009, when development was halted due to economic difficulties. Richmond Hills defaulted on its First Bank loan. In February 2010, in anticipation of a foreclosure sale, Mr. Saieed requested that Plaintiff write a letter detailing the work completed by Plaintiff and the status of permits that had been obtained for the property. Plaintiff complied, sending Mr. Saieed a letter dated 22 February 2010 that contained the information sought. The property was sold 26 February 2010 at foreclosure to First Bank for \$4,000,000.00.

Concerning the work done by Plaintiff, Mr. Irvin testified in his deposition as follows:

Q: On the Richmond Hills project, what was Ramey Kemp supposed to do on this project?

A: Obtain driveway permitting approval. I mean, that's the primary goal to get the driveway permits and approvals so the development can proceed. Without the access, they can't develop the property.

Q: So that was the basic project and everything else was a subset under it?

A: That's the basic part of the project. I mean, and everything goes into that: Coordination with the NCDOT and the County; dealing with traffic engineering studies; the roadway design plans; control of access approval; and general coordination through the whole process and then we did not get to the point of construction administration but we would likely have continued on and done that.

Q: And why was the stage of construction management not reached?

A: To my knowledge, you know, the project stopped when the economy fell apart.

Q: Yeah. When was that?

A: I would say I couldn't put a definitive date on it or anything but I would say '09, somewhere in '09 but we continued to work on Mr. Saieed's behalf during that time and up through now.

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Q: What have you done on the project recently?

A: Other than all of this stuff? Nothing that relates—I think the last thing we did was an update for Mr. Saieed to let him know where everything stood permitting-wise. He indicated to us that he had a buyer and needed an update of the permits and status of the approvals and what were the next steps going forward. I think he—I don’t remember the exact date of that but it was not too long ago; and I think again back in 2010, he asked for the same thing.

Plaintiff’s invoices show that the last work done by Plaintiff before “the project stopped when the economy fell apart” was on 11 February 2009. The work Plaintiff completed “for Mr. Saieed to let him know where everything stood permitting-wise” was between 3 February 2010 and 24 February 2010. The dispositive question is whether the last work performed by Plaintiff pursuant to the 2005 contract was completed in February 2009, or February 2010.

I note that the majority states as fact, in its “Substantive Facts” section, definitive statements from Plaintiff’s complaint and affidavits concerning the contested issues on appeal. For example, the majority, quoting Mr. Irvin’s affidavit, states as fact: “The services that ‘[Plaintiff] performed were not piecemeal and subject to separate contracts or work orders, but constituted a single Contract[.]’ ” If, as the majority states, this is a “fact,” then our analysis is over. However, whether there was only evidence of a single contract, or evidence of two separate contracts, is the issue currently before us.

## II. Analysis

In ruling on a motion for summary judgment, “the court may consider the pleadings, depositions, admissions, affidavits, answers to interrogatories, oral testimony and documentary materials.” All such evidence must be considered in a light *most favorable to the non-moving party*. On appeal, an order allowing summary judgment is reviewed *de novo*.

*Howerton v. Arai Helmet, Ltd.*, 358 N.C. 440, 469, 597 S.E.2d 674, 692 (2004) (citations omitted) (emphasis added).

Plaintiff, in its complaint, asserted it entered into a contract with Richmond Hills in 2005 that provided that Plaintiff would furnish

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“labor, materials and equipment necessary to complete professional design services in regards to traffic engineering services which includes, but is not limited to, preparing design plans, pavement marking and signing plans, drainage, sedimentation and erosion control designs, driveway designs, signal designs and encroachment agreement for [Defendant’s] property.”

In their answer, Defendants denied Plaintiff’s assertion regarding the provisions of the contract. It is true that Defendants’ answer is unverified and cannot be treated as an affidavit. It is also true that: “In opposing a motion for summary judgment, the non-moving party ‘may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial.’ N.C.R. Civ. P. 56(e).” *Dixon v. Hill*, 174 N.C. App. 252, 261-62, 620 S.E.2d 715, 721 (2005). The majority states: “Defendants have not argued that the record disclosed the existence of any genuine issue of material fact.” However, Defendants argue on appeal, based upon their deposition questioning of Mr. Irvin, that the work contemplated by the 2005 contract was completed by 2009, and that a new contract was entered into between Plaintiff and a different entity more than a year later. Plaintiff argues that there was only one contract, and that the report produced by Plaintiff in 2010 was contemplated by the 2005 contract. These are issues of material fact, and the evidence is not uncontroverted.

Plaintiff, and the majority, rely heavily on Mr. Irvin’s affidavit. However, Mr. Irvin also gave testimony by deposition. Defendants’ counsel deposed Mr. Irvin on 12 August 2011, and during that deposition, Mr. Irvin was asked about his personal role in the Richmond Hills project. Mr. Irvin replied that it was: “Fairly limited. I would have been involved up front with oversight of the transportation studies; coordinating with our staff to make sure the project is getting done; you know, any issues would be brought to my attention to resolve and guide the project.” During Mr. Irvin’s deposition, the following exchange occurred:

Q: Is there a contract in this case?

A [Mr. Irvin]: Verbal contract. I have not personally seen a hard copy contract but it’s quite common for us to proceed with clients that we have worked with in the past to get going on a project and they tell us to go to

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work and we go to work and there is an understanding that it's going to take a certain amount of effort and we begin work and start billing and they start paying and that's the contract.

Q: Did you act on behalf of Ramey Kemp in the formation of whatever contract there is in this case?

A: I don't understand.

Q: Did you represent Ramey Kemp and speak for Ramey Kemp in terms of making any contract there is in this case?

A: I don't recall. I don't recall. It was back in 2005 when we got started. I could easily have been the person who coordinated that with Steve Saieed on the phone or via email. I just don't remember.

Q: Do you know whether Steve Saieed was the person who would have been the person acting on behalf of Richmond Hills on this project?

A: Yes.

Q: You said you did not know or think that there was a hard contract; do you mean a written contract by that?

A: Written, right. There may be but I haven't seen it. But if I can expand?

Mr. Smith: Sure.

A: Even if there was, I mean, there was a lot of effort that would have gone beyond what would have been written in 2005 as the beginning of a contract with Mr. Saieed. On projects similar to this, we quite often begin a project like this with a traffic engineering study or traffic impact study and a proposal is given when asked for a proposal and we spell out a scope of work and an estimated fee.

Quite often, it's hourly plus expenses and we begin work and if services beyond the written scope are required, we spell out in our proposal that we will continue working on an hourly basis and that's quite often what we do and then as the traffic engineering study is completed

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and negotiations with NCDOT are completed, we begin roadway design plans and more often than not, we move straight into the design with the same understanding.

N.C. Gen. Stat. § 1A-1, Rule 56(c) states that summary judgment may be rendered only if “the pleadings, *depositions*, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law.” N.C. Gen. Stat. § 1A-1, Rule 56(c) (2011) (emphasis added).

Based on Defendants’ deposition of Mr. Irvin, it is unclear whether there was a written contract in the present case and what terms were included in that written contract or any verbal contract. Mr. Irvin’s testimony was that he did not know whether a written contract existed, and that he did not remember if he was involved in the negotiation and execution of whatever contract was entered into in 2005. Mr. Irvin’s affidavit assertion that the work done to produce the February 2010 letter “included tasks that would have been contemplated, expected, and required in a project such as this one” does not actually state that these tasks were contemplated in the 2005 contract at issue. Mr. Irvin’s deposition raises questions concerning Mr. Irvin’s actual knowledge surrounding that 2005 contract, and constitutes evidence potentially contradicting Mr. Irvin’s self-serving definitive statements that there was only one contract and that the last work done by Plaintiff was pursuant to that single contract.

Although Mr. Irvin’s affidavit presents a statement more favorable to Plaintiff on this issue, Mr. Irvin’s uncertainty concerning even the manner in which the contract was entered, or the form it took, raises a question of fact on this issue. This is particularly evident when we, as we must, consider all evidence “in a light most favorable to the non-moving party.” *Howerton*, 358 N.C. at 469, 597 S.E.2d at 692; see also *Van Reyden Assocs. v. Teeter*, 175 N.C. App. 535, 539, 624 S.E.2d 401, 404 (2006) (“A moving party has the burden of establishing the lack of any triable issue of fact, and its supporting materials are carefully scrutinized, with all inferences resolved against it.”) (Citations and quotation marks omitted). I also believe Mr. Irvin’s deposition testimony raised questions of weight and credibility. “If there is any question as to the credibility of witnesses or the weight of evidence, a summary judgment should be denied[.]” *Kessing v. Mortgage Corp.*, 278 N.C. 523, 535, 180 S.E.2d 823, 830 (1971) (citation omitted).



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The majority states that “the February 2010 report was sent to Mr. Saieed c/o Cape Fear Land Managers, LLC[,]” and that “the uncontradicted [record] evidence . . . indicates that, throughout the contract period, Plaintiff consistently sent invoices for the work performed under its contract with Richmond Hills to Mr. Saieed c/o Cape Fear Land Managers, LLC.” In fact, the invoices for the work Defendants agree was performed under the 2005 contract were sent to:

Steve Saieed  
Richmond Hills Residential Partners LLC  
c/o Cape Fear Land Managers LLC  
3317 Masonboro Loop Road, Suite 150  
Wilmington, NC 28409

The contested February 2010 letter and report were sent to:

Steve Saieed  
Cape Fear Land Managers LLC  
3317 Masonboro Loop Road, Suite 150  
Wilmington, NC 28409

Though the earlier invoices and the February 2010 report were all sent to Steve Saieed, it would appear the invoices were sent to Richmond Hills—the c/o indicating Richmond Hills was taking mail at Cape Fear’s address—while the February 2010 report was sent to Cape Fear as an entity. On Plaintiff’s Claim of Lien, filed 30 March 2010, Plaintiff stated:

Name and address of the entity with whom the  
[Plaintiff] contracted for the furnishing of labor and  
materials:

Richmond Hills Residential Partners, LLC  
Stephen D. Saieed, its Registered Agent.

Plaintiff acknowledges that the 2005 contract was between Plaintiff and Richmond Hills, with Stephen Saieed acting as agent. If the agreement to produce the February 2010 letter was between Plaintiff and Cape Fear, with Stephen Saieed acting as agent, then a second, independent contract is implied, and a question of fact—namely the existence of a second contract—is raised by the evidence. This constitutes admissible evidence contradicting Mr. Irvin’s statement that the “last work performed by Plaintiff on the property was at the specific request of Steve Saieed *on behalf of Richmond Hills.*” (Emphasis added.).

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I note that though Plaintiff's evidence is limited to assertions that the sole contract was between it and Richmond Hills, there is record evidence that the 2005 contract was being performed, at least in part, by Cape Fear. Cape Fear applied for permits for the project, for example. Additional facts concerning the relationship between Richmond Hills and Cape Fear may inform the proper outcome in this matter. The record before us, like the material that was before the trial court, is insufficient to make that determination.

Mr. Irvin, in his affidavit, states that the "last work performed by Plaintiff on the property was at the specific request of Steve Saieed on behalf of Richmond Hills." The fact that Plaintiff's own February 2010 letter, constituting its last work on the project, was addressed to Steve Saieed, Cape Fear Land Managers LLC, when prior record invoices were addressed to Steve Saieed, Richmond Hills Residential Partners LLC, is some record evidence contradicting Mr. Irvin's affidavit statement. I believe that a question of material fact was raised by the "pleadings, depositions, admissions, affidavits, answers to interrogatories, oral testimony and documentary materials" such that summary judgment was improper. *Howerton*, 358 N.C. at 469, 597 S.E.2d at 692.

Because the terms of the contract are central to determining whether the November 2010 letter was a contemplated service under the 2005 contract, or was the product of a second contract and, therefore, whether Plaintiff's right to file a claim of lien against Defendants' property was preserved, the dispute as to the terms of the contract also raises a genuine issue of material fact and precludes summary judgment. *See Schenkel & Shultz, Inc. v. Hermon F. Fox & Associates, P.C.*, 362 N.C. 269, 658 S.E.2d 918 (2008) (summary judgment improper when contested terms of contract raised genuine issue of material fact).

I would reverse the trial court's grant of summary judgment and remand for further proceedings. I am making no comment concerning whether Plaintiff should ultimately prevail and be reimbursed for the work it completed for Richmond Hills (or, perhaps, for Cape Fear). However, because issues of material fact exist, summary judgment at this stage was improper.

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STATE OF NORTH CAROLINA

v.

EDY CHARLES BANKS, JR.

No. COA12-531

Filed 5 February 2013

**Rape—statutory—second-degree rape—lesser-included offense  
—separate punishments prohibited—failure to object—ineffective assistance of counsel**

The trial court erred by denying defendant's motion for appropriate relief based on ineffective assistance of counsel. Under the reasoning of *State v. Ridgeway*, 185 N.C. App. 423, separate punishments for statutory rape and second-degree rape, a lesser-included offense of first degree rape, are prohibited by legislative intent. Because defense counsel failed to object to defendant's judgment which sentenced him for both statutory rape and second degree rape convictions based upon a single act of sexual intercourse, defendant received ineffective assistance of counsel.

On writ of *certiorari* to review order entered 5 December 2011 by Judge Anna Mills Wagoner in Rowan County Superior Court. Heard in the Court of Appeals 10 October 2012.

*Attorney General Roy Cooper, by Assistant Attorney General Amy Kunstling Irene, for the State.*

*NC Prisoner Legal Services, Inc., by Allison Standard, for defendant-appellant.*

CALABRIA, Judge.

Edy Charles Banks, Jr. ("defendant") appeals the trial court's order denying his motion for appropriate relief ("MAR") for ineffective assistance of counsel ("IAC"). We reverse and remand.

**I. Background**

On 29 November 2007, a jury returned verdicts finding defendant guilty of statutory rape of a person who is 13, 14, or 15 years old by a defendant who is at least 6 years older, second degree rape of a person who is mentally disabled, and taking indecent liberties with a child in Rowan County Superior Court. For the statutory rape conviction, the trial court sentenced defendant to a minimum of 240 months to a maximum of 297 months. For the second degree rape and

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indecent liberties convictions, the trial court sentenced defendant to a minimum of 73 months to a maximum of 97 months. Defendant's sentences were to be served consecutively in the North Carolina Department of Correction. Defendant appealed.

In an unpublished opinion, this Court found no error in defendant's trial. *State v. Banks*, 201 N.C. App. 591, 689 S.E.2d 245, 2009 N.C. App. LEXIS 2416, 2009 WL 4931757 (2009)(unpublished). On appeal, defendant argued, *inter alia*, that his convictions for statutory rape and second degree rape, which were based upon the same act of sexual intercourse, violated his double jeopardy rights. *Id.* This Court dismissed defendant's argument because it had not been raised before the trial court. *Id.*

On 2 September 2011, defendant filed an MAR alleging IAC on the basis of his trial counsel's failure to challenge his charges, convictions, and sentences for both statutory rape and second degree rape offenses. Defendant argued that he was improperly convicted and sentenced for both convictions when they both arose from a single act of sexual intercourse.

On 5 December 2011, the trial court, without holding an evidentiary hearing, entered an order denying defendant's MAR, concluding that his constitutional rights were not violated because defendant was convicted of "separate and distinct crimes." In addition, the court concluded that there was "no clear legislative intent to prohibit multiple convictions for the same conduct." Accordingly, the trial court found that defendant failed to establish that his trial counsel's performance fell below an objective standard of reasonableness. Defendant filed a petition for writ of *certiorari* to review the trial court's order. The petition was granted 8 February 2012.

## II. Standard of Review

"When considering rulings on motions for appropriate relief, we review the trial court's order to determine 'whether the findings of fact are supported by evidence, whether the findings of fact support the conclusions of law, and whether the conclusions of law support the order entered by the trial court.'" *State v. Frogge*, 359 N.C. 228, 240, 607 S.E.2d 627, 634 (2005) (quoting *State v. Stevens*, 305 N.C. 712, 720, 291 S.E.2d 585, 591 (1982)).

## III. Ineffective Assistance of Counsel

Defendant argues that the trial court erred in denying his MAR. Specifically, defendant contends that he received IAC when his coun-

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sel failed to object to defendant's judgment which sentenced him for both statutory rape and second degree rape convictions that were based upon a single act of sexual intercourse. We agree.

To prevail on a claim of ineffective assistance of counsel, a defendant must first show that his counsel's performance was deficient and then that counsel's deficient performance prejudiced his defense. Deficient performance may be established by showing that counsel's representation fell below an objective standard of reasonableness. Generally, to establish prejudice, a defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.

*State v. Allen*, 360 N.C. 297, 316, 626 S.E.2d 271, 286 (2006)(internal quotations and citations omitted). In order to determine if defendant's counsel was ineffective, we must first determine whether defendant was improperly sentenced for both rape convictions.

A. Double Jeopardy

In the instant case, defendant's convictions for statutory rape and second degree rape were based upon a single act of sexual intercourse. Our Supreme Court has stated:

Where, as here, a single criminal transaction constitutes a violation of more than one criminal statute, the test to determine if the elements of the offenses are the same is whether each statute requires proof of a fact which the others do not. By definition, all the essential elements of a lesser included offense are also elements of the greater offense. Invariably then, a lesser included offense requires no proof beyond that required for the greater offense, and the two crimes are considered identical for double jeopardy purposes. If neither crime constitutes a lesser included offense of the other, the convictions will fail to support a plea of double jeopardy.

*State v. Etheridge*, 319 N.C. 34, 50, 352 S.E.2d 673, 683 (1987) (citing *Blockburger v. United States*, 284 U.S. 299, 76 L. Ed. 306 (1932))(citations omitted).

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In *Etheridge*, our Supreme Court held that convictions of statutory rape, taking indecent liberties with a child, and incest, where the criminal act in question arose out of a single transaction, do not violate a defendant's rights against double jeopardy, because "[t]he three are legally separate and distinct crimes, none of which is a lesser included offense of another." *Id.* at 50, 352 S.E.2d at 683. Our Courts have also held that a defendant's double jeopardy rights are not violated by convictions for the offenses of crime against nature and second degree sexual offense, *State v. Warren*, 309 N.C. 224, 306 S.E. 2d 446 (1983), statutory rape and indecent liberties, *State v. Weaver*, 306 N.C. 629, 295 S.E.2d 375 (1982), and crime against nature and indecent liberties, *State v. Copeland*, 11 N.C. App. 516, 181 S.E.2d 722 (1971), when the convictions arose from a single sexual act. Since the instant case cannot be materially distinguished from these cases, we must reject defendant's argument that his convictions for both second degree rape and statutory rape violated his double jeopardy rights.

**B. Legislative Intent**

However, the fact that the constitutional prohibition against double jeopardy is inapplicable to defendant's case does not end our inquiry regarding the propriety of defendant's sentence. The trial court's order denying defendant's MAR also concluded that there was "no clear legislative intent to prohibit multiple convictions for the same conduct." Our Supreme Court has held that the legislative intent of the General Assembly may also control whether multiple punishments for the same criminal act may be imposed at the same trial. *See State v. Davis*, 364 N.C. 297, 302-05, 698 S.E.2d 65, 67-69 (2010)(concluding that the General Assembly intended to prohibit punishment for convictions of felony death by vehicle and felony serious injury by vehicle when the defendant was punished for the same conduct by convictions for second degree murder and assault with a deadly weapon inflicting serious injury). Although some cases from this Court have elected to analyze the General Assembly's legislative intent through the lens of double jeopardy, rather than as a separate analysis, we find it more appropriate to consider legislative intent as an independent basis to determine the validity of multiple punishments for the same act. *See id.* In the instant case, we consider the legislative intent analysis conducted in our decision in *State v. Ridgeway*, 185 N.C. App. 423, 648 S.E.2d 886 (2007).

In *Ridgeway*, this Court held that the trial court properly allowed the jury to review evidence of both statutory rape and first degree

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rape arising out of a single act of sexual intercourse. *Id.* at 434, 648 S.E.2d at 894. However, the Court held that upon verdicts of guilty on both theories, judgment on one conviction must be arrested. *Id.* To reach this conclusion, the *Ridgeway* Court conducted the following analysis regarding the legislative intent behind the enactment of N.C. Gen. Stat. § 14-27.7A, which criminalizes the offense of statutory rape:

Under the original statutes for rape and sexual offense, a plain reading of the statutes shows the legislative intent was to provide alternate methods by which the State can prove the crimes of rape or sexual offense: *intercourse or a sexual act with a child under 13* or intercourse or a sexual act with any person by force and against the will. *See* N.C.G.S. §§ 14-27.2, 14 -27.4 (2005). In 1995, the legislature adopted a new statute *extending protection to children between the ages of 13 and 15 from sexual acts or intercourse by older persons*. N.C. Gen. Stat. § 14-27.7A (2005). Separate convictions for these offenses, even though consolidated for a single judgment, ‘have potentially severe adverse collateral consequences.’

*Id.* at 435, 648 S.E.2d at 894-95 (emphasis added). Thus, this Court has interpreted N.C. Gen. Stat. § 14-27.7A as merely providing an extension of one of the “alternate methods by which the State can prove the crime[] of rape” under N.C. Gen. Stat. § 14-27.2, which criminalizes first degree rape. This interpretation is consistent with the classification of both offenses as Class B1 felonies. *See* N.C. Gen. Stat. § 14-27.2(a), 14-27.7A (2011).

In the instant case, the statute under which defendant was convicted, N.C. Gen. Stat. § 14-27.3, criminalizes second degree rape and provides the State with additional alternatives of proving rape which would not, standing alone, result in a first degree rape conviction. Specifically, that statute criminalizes sexual intercourse with a person “[w]ho is mentally disabled, mentally incapacitated, or physically helpless, and the person performing the act knows or should reasonably know the other person is mentally disabled, mentally incapacitated, or physically helpless.” N.C. Gen. Stat. § 27.3 (2011). Nonetheless, second degree rape is undoubtedly a lesser included offense of first degree rape. Since the *Ridgeway* Court concluded that separate punishments for the offenses of statutory rape and first degree rape are prohibited by the legislative intent of the General Assembly, we are similarly compelled to conclude that separate pun-

## STATE v. BANKS

[225 N.C. App. 417 (2013)]

ishments for statutory rape and second degree rape, a lesser included offense of first degree rape, are also prohibited by legislative intent. Consequently, defendant should not have been sentenced for both statutory rape and second degree rape after he was convicted of these offenses. On remand, the trial court must arrest judgment on either defendant's statutory rape conviction or his second degree rape conviction. *See Ridgeway*, 185 N.C. App. at 435, 648 S.E.2d at 895.

C. Ineffective Assistance

This Court released its opinion in *Ridgeway* approximately three months prior to defendant's trial and the entry of judgment in the instant case. The logical implication of *Ridgeway* was that defendant could not have been properly punished for both statutory rape and second degree rape based upon a single act of sexual intercourse. Thus, an objectively reasonable attorney would have raised an objection to defendant's judgment and sentence. Moreover, since the consecutive judgments imposed against defendant were impermissible, defendant was clearly prejudiced by his counsel's failure to raise the issue before the trial court. Accordingly, we conclude that defendant received ineffective assistance of counsel and is entitled to relief. *See Allen*, 360 N.C. at 316, 626 S.E.2d at 286.

IV. Conclusion

In light of this Court's opinion in *Ridgeway*, defendant was improperly sentenced for his convictions for both statutory rape and second degree rape because the General Assembly did not intend to subject a defendant to separate punishments for these offenses based upon a single act of sexual intercourse. The *Ridgeway* decision was published several months prior to defendant's trial. Therefore, defendant received ineffective assistance from his trial counsel because counsel failed to raise the issue before the trial court. As a result, we reverse the trial court's order denying defendant's MAR, and remand the case to the trial court to take appropriate action consistent with this opinion.

Reversed and remanded.

Judges HUNTER, Robert C. and HUNTER, JR., Robert N. concur.



**STATE v. BOONE**

[225 N.C. App. 423 (2013)]

STATE OF NORTH CAROLINA

v.

ALVANIA BOONE, JR., DEFENDANT

No. COA12-675

Filed 5 February 2013

**Probation and Parole—revocation—insufficient evidence of violation**

The trial court erred by revoking defendant's probation and activating his jail sentence for failing to complete any of his community service, being \$700 in arrears of his original balance, and being \$150 in arrears of his supervision fee. The State failed to present evidence of a payment plan and schedule for community service or any evidence that defendant had not paid his required fines or performed his required community service at the time of the revocation hearing.

Appeal by defendant from judgment entered on or about 7 February 2012 by Judge Joseph N. Crosswhite in Superior Court, Davidson County. Heard in the Court of Appeals 10 January 2013.

*Attorney General Roy A. Cooper, III by Assistant Attorney General Deborah M. Greene, for the State.*

*Appellate Defender Staples Hughes by Assistant Appellate Defender Jon H. Hunt and Benjamin Dowling-Sendor, for defendant-appellant.*

STROUD, Judge.

Defendant appeals from judgment entered on or about 7 February 2012 revoking his probation and activating his sentence of 120 days confinement in the local jail. Defendant argues that there was insufficient evidence that he violated the terms of his probation to justify the revocation. For the following reasons we agree and reverse the superior court's judgment.

On or about 7 October 2009, Alvania Boone, Jr. ("defendant") pleaded guilty to one count of operating a motor vehicle while subject to an impairing substance and was sentenced to 120 days confinement suspended for one year of supervised probation. The trial court ordered defendant to perform 48 hours of community service, although no date for completion of the community service was noted on the judgment, and to pay \$1,385 in costs, fines, and fees, as well as

**STATE v. BOONE**

[225 N.C. App. 423 (2013)]

the probation supervision fee. The schedule required for defendant's payments and community service was to be established by the probation officer.

On or about 6 April 2010, Probation Officer Lisa Ratcliffe filed a violation report alleging that defendant had willfully violated his probation by failing to complete any of his community service, being \$700 in arrears of his original balance, and being \$150 in arrears of his supervision fee. Defendant denied all of the violations. The District Court, Davidson County, ordered defendant's probation revoked after finding that defendant had violated the terms of his probation. Defendant appealed to Superior Court, which held a revocation hearing and, by judgment entered on or about 7 February 2012, also found that defendant had willfully violated the terms of his probation and revoked his probation. Defendant gave notice of appeal in open court.

Defendant contends that there was no evidence presented that he violated the terms of his probation because the State failed to present evidence of a payment plan and schedule for community service or any evidence that defendant had not paid his required fines or performed his required community service at the time of the revocation hearing. We agree.

A hearing to revoke a defendant's probationary sentence only requires that the evidence be such as to reasonably satisfy the judge in the exercise of his sound discretion that the defendant has willfully violated a valid condition of probation or that the defendant has violated without lawful excuse a valid condition upon which the sentence was suspended. The judge's finding of such a violation, if supported by competent evidence, will not be overturned absent a showing of manifest abuse of discretion.

*State v. Young*, 190 N.C. App. 458, 459, 660 S.E.2d 574, 576 (2008) (citations and quotation marks omitted).

The only testimony presented at the revocation hearing was from Officer Lisa Radcliffe, a probation and parole officer who had been supervising defendant at the time she filed the violation report, but was no longer supervising defendant at the time of the revocation hearing 22 months later.<sup>1</sup> Officer Radcliffe's testimony concerning defendant's alleged violations was as follows:

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1. Defendant's probation was not extended past October 2010, but had been held open by the filing of the violation report.

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[Officer Radcliffe]: Your Honor, at the time of the violation, number one was that he had failed to complete any of the 48 hours community service ordered by the courts. Number two, he was in arrearage \$700 of his original obligation of \$1385. And number three, he was in arrearage \$150 in his supervision fees.

[Prosecutor]: So did you have any conversation with him about his community service hours or—

[Officer Radcliffe]: Yes, sir. He wasn't able to get a ride for community service so he wanted to do 48 hours in custody in lieu of community service.

[Prosecutor]: And what did you tell him?

[Officer Radcliffe]: He would be asking the Judge—my boss would not allow me to do that. He can do the community service that he was ordered. But he said he does not have a ride to the landfill.

[Prosecutor]: What about the money? Did you have any conversation with him about the money?

[Officer Radcliffe]: He did give me a receipt. I do not have that file with me. But he had paid in some monies towards this case. Also, a reason for him being violated is he's on for DWI and he has a pending DWI and it has been appealed to Superior Court also.

Officer Radcliffe never testified as to any payment schedule that had been established or any schedule for defendant's community service obligation. At the time of the violation report, six months remained on his probation. The initial judgment entered against defendant required 48 hours of community service, but did not specify a time within which that service was to be completed. Instead, the trial court left the scheduling for both a payment plan for all assessed fees and fines and the community service schedule to defendant's probation officer. Absent *any* evidence of a required payment schedule, Officer Radcliffe's conclusory testimony that defendant was in arrears is insufficient to support a finding that defendant had willfully violated the terms of his probation by failing to pay the required fees or perform community service on time.

Therefore, we hold that the trial court's findings were not supported by the evidence and that the trial court erred in revoking

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[225 N.C. App. 426 (2013)]

defendant's probation. Accordingly, we reverse the trial court's judgment revoking defendant's probation and activating his sentence. *See State v. Sherrod*, 191 N.C. App. 776, 782, 663 S.E.2d 470, 475 (2008) (reversing the trial court's revocation of probation where the evidence did not support the findings).

REVERSED.

Judges HUNTER, JR., Robert N. and DAVIS concur.

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STATE OF NORTH CAROLINA  
v.  
CHARLAYNE ANNETTE CRAWFORD

No. COA12-565

Filed 5 February 2013

**1. Sentencing—prior record points—federal felony convictions**

The trial court did not err by finding that defendant had four prior record points and sentencing her at a prior record level II where defendant made no showing before the trial court that either of her two prior federal felony convictions were substantially similar to North Carolina misdemeanors.

**2. Constitutional Law—effective assistance of counsel—sentencing—prior federal felonies**

Defendant suffered no prejudice and no ineffective assistance of counsel where she contended that counsel was ineffective for failing to demonstrate that her prior federal convictions were substantially similar to North Carolina misdemeanors. The two offenses, N.C.G.S. § 14-225 and 18 U.S.C. § 1001, were not substantially similar.

**3. Burglary and Unlawful Breaking or Entering—felony breaking and entering—guilty plea—factual basis—sufficient statement**

The State presented a sufficient factual basis to support defendant's conviction of felony breaking and entering where the State's summary of the factual basis for the plea was sufficient to meet the requirements of N.C.G.S. § 15A-1022(c).

**STATE v. CRAWFORD**

[225 N.C. App. 426 (2013)]

Appeal by defendant from judgment entered 11 January 2012 by Judge Richard L. Doughton in Buncombe County Superior Court. Heard in the Court of Appeals 22 October 2012.

*Attorney General Roy Cooper by Assistant Attorney General Jonathan Shaw for the State.*

*Appellate Defender Staples S. Hughes by Assistant Appellate Defender Kathleen M. Joyce for defendant-appellant.*

STEELMAN, Judge.

Where defendant failed to demonstrate that her federal felony convictions were substantially similar to North Carolina misdemeanors, the trial court correctly sentenced her as a prior felony record level II. Where defendant cannot show that one of her prior federal felony convictions was substantially similar to a North Carolina misdemeanor, her claim of ineffective assistance of counsel must fail. The State presented a sufficient factual basis to support defendant's plea of guilty to the charge of felony breaking or entering under N.C. Gen. Stat. § 15A-1022(c).

### I. Factual and Procedural Background

Charlayne Annette Crawford (defendant) was indicted for felonious breaking and/or entering, larceny after breaking and/or entering, and obtaining property by false pretenses. On 11 January 2012, defendant pled guilty to felony breaking and/or entering. Defendant was sentenced to 8-10 months imprisonment. That sentence was suspended, and defendant was placed on 60 months of supervised probation.

Defendant appeals.

### II. Writ of *Certiorari*

In her petition for writ of *certiorari*, defendant concedes that she failed to serve her *pro se* notice of appeal upon the State.

In our discretion, we grant defendant's petition for writ of *certiorari* pursuant to North Carolina Rule of Appellate Procedure 21.

### III. Calculation of Prior Record Level

[1] In her first argument, defendant contends that the trial court erred in computing her felony sentencing level. We disagree.

Upon her plea of guilty to felony breaking and/or entering, the State and defendant submitted a felony sentencing worksheet (AOC-

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CR-600). This worksheet contained the following stipulation, signed by counsel for the State and defendant: “The prosecutor and defense counsel . . . stipulate to the information set out in Sections I and V of this form, and agree with the defendant’s prior record level or prior conviction level as set out in Section II based on the information herein.” Section V of the worksheet showed two prior convictions: (1) impersonating an officer; and (2) false statement to the FBI. These convictions were not in the courts of North Carolina and were shown as Class I felonies. Based upon these convictions, the trial court found two prior Class I felony convictions, for a total of four points, and that defendant was a prior record level II for felony sentencing. Defendant was sentenced as a level II offender, from the presumptive range of sentences.

On appeal, defendant does not dispute that both convictions, which were in federal court, were felonies under federal law. She also acknowledges that under the provisions of N.C. Gen. Stat. § 15A-1340(e), the burden rested upon the defendant to show that the offense committed in another jurisdiction was substantially similar to a misdemeanor in North Carolina. Defendant now contends that impersonation of an officer was a Class 1 misdemeanor in North Carolina and that making a false statement to the FBI was similar to making a false report to law enforcement, a Class 2 misdemeanor in North Carolina.

N.C. Gen. Stat. § 15A-1340.14(e) provides:

Except as otherwise provided in this subsection, a conviction occurring in a jurisdiction other than North Carolina is classified as a Class I felony if the jurisdiction in which the offense occurred classifies the offense as a felony . . . . If the offender proves by the preponderance of the evidence that an offense classified as a felony in the other jurisdiction is substantially similar to an offense that is a misdemeanor in North Carolina, the conviction is treated as that class of misdemeanor for assigning prior record level points.

N.C. Gen. Stat. § 15A-1340.14(e) (2011).

In *State v. Hinton*, 196 N.C. App. 750, 675 S.E.2d 672 (2009), this Court held that where the State relied upon the default classification for out-of-state felonies of Class I, it was not required to prove that the felonies were “substantially similar to North Carolina offenses[.]” *Hinton*, 196 N.C. at 755, 675 S.E.2d at 675-76. In such a situation, as

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[225 N.C. App. 426 (2013)]

in the instant case, it became the burden of defendant to demonstrate that the out-of-state felonies were substantially similar to a North Carolina misdemeanor.

Defendant made no showing before the trial court that either of her two prior federal felony convictions were substantially similar to North Carolina misdemeanors. The trial court did not err in finding that defendant had 4 prior record points and sentencing her at a prior record level II.

This argument is without merit.

**IV. Ineffective Assistance of Counsel**

**[2]** In her second argument, defendant contends that counsel was ineffective for failing to demonstrate that her prior federal convictions were substantially similar to North Carolina misdemeanors. We disagree.

“The two-part test for ineffective assistance of counsel is the same under both the state and federal constitutions.” *State v. Thompson*, 359 N.C. 77, 115, 604 S.E.2d 850, 876 (2004). “A defendant must first show that his defense counsel’s performance was deficient and, second, that counsel’s deficient performance prejudiced his defense. *Thompson*, 359 N.C. at 115, 604 S.E.2d at 876 (citing *Strickland v. Washington*, 466 U.S. 668, 687, 80 L.Ed.2d 674, 693 (1984)).

In the instant case, defendant can show no prejudice. The North Carolina statute that she cites as being substantially similar to the federal offense of making a false statement to the FBI is N.C. Gen. Stat. § 14-225. That statute makes it a Class 2 misdemeanor to make a “false, misleading or unfounded report” to law enforcement. N.C. Gen. Stat. § 14-225 (2011). The federal statute makes it a criminal offense where one knowingly and willfully

- (1) falsifies, conceals, or covers up by any trick, scheme, or device a material fact;
- (2) makes any materially false, fictitious, or fraudulent statement or representation; or
- (3) makes or uses any false writing or document knowing the same to contain any materially false, fictitious, or fraudulent statement or entry.

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The North Carolina statute deals only with a “report” and contains no requirement of materiality. We hold that N.C. Gen. Stat. § 14-225 and 18 U.S.C. § 1001 are not substantially similar.

Since defendant can show no prejudice, her claim for ineffective assistance of counsel must fail.

**V. Factual Basis of Guilty Plea**

[3] In her third argument, defendant contends that the State failed to present a sufficient factual basis to support her conviction of felony breaking and/or entering. We disagree.

Immediately before the calling of this case for trial, the parties announced to the court that they agreed upon a plea arrangement. The terms of the plea arrangement were that defendant would plead guilty to one count of felonious breaking and/or entering and that the State would dismiss the other charges. The trial court personally went over the plea transcript with defendant. After stipulating to her prior convictions and record level, defendant stipulated that there was a factual basis for the guilty plea and that the State could present a summary of the evidence. The State then proceeded to summarize the evidence in this case. BB&T owned a residence located at 128 Lake Drive in Candler as a result of a foreclosure. Defendant broke into the house and was preparing to move into the house when a realtor discovered her on the property.

We hold that the State’s summary of the factual basis for the plea was sufficient to meet the requirements of N.C. Gen. Stat. § 15A-1022(c).

This argument is without merit.

PETITION FOR WRIT OF CERTIORARI ALLOWED.

AFFIRMED.

Chief Judge MARTIN and Judge ERVIN concur.



**STATE v. GRAY**

[225 N.C. App. 431 (2013)]

STATE OF NORTH CAROLINA

v.

VERNON PETE GRAY, III

No. COA12-153

Filed 5 February 2013

**Constitutional Law—effective assistance of counsel—conflict of interest—new trial**

An armed robbery defendant received a new trial where his counsel had represented a state's witness in a prior unrelated matter and the record clearly reflected that defendant refused to waive the potential conflict of interest and requested new counsel. Neither the judge at a pretrial hearing nor the trial judge conducted any inquiry into the nature and extent of the potential conflict or whether defendant wished to knowingly, intelligently, and voluntarily waive the conflict. The showing of an actual conflict of interest that adversely affected defendant's representation was not required because defendant objected to continued representation by the trial counsel and requested new counsel.

Appeal by defendant from judgment entered 4 October 2011 by Judge William R. Pittman in Forsyth County Superior Court. Heard in the Court of Appeals 14 August 2012.

*Attorney General Roy Cooper, by Assistant Attorney General John F. Oates, Jr., for the State.*

*John Keating Wiles for Defendant.*

ERVIN, Judge.

Defendant Vernon Pete Gray, III, appeals from a judgment sentencing him to a term of sixty to eighty-one months imprisonment based upon his conviction for robbery with a dangerous weapon. In challenging the trial court's judgment, Defendant argues that the trial court erred by proceeding to conduct Defendant's trial despite the fact that Defendant objected to continuing representation by his appointed counsel on the grounds that his appointed counsel had previously represented one of the State's witnesses. After careful consideration of Defendant's challenge to the trial court's judgment in light of the record and the applicable law, we conclude that Defendant is entitled to a new trial.

**STATE v. GRAY**

[225 N.C. App. 431 (2013)]

I. Factual BackgroundA. Substantive Facts1. State's Evidence

Around 11:00 a.m. on 29 August 2010, an individual entered a Family Fare BP station located on University Parkway in Winston-Salem. At that time, the perpetrator demanded that the store clerk, Dana Palm, give him the money from the cash register, which totaled approximately \$150.00 to \$180.00. As he did so, the perpetrator threatened Mr. Palm with a box cutter. After taking the money, the perpetrator left the store, at which point Mr. Palm called 911 to report the robbery. Although Mr. Palm indicated at an identification procedure conducted shortly after Defendant was taken into custody in the immediate aftermath of the robbery that he had a “good idea” that Defendant had committed the robbery, he concluded that Defendant was the perpetrator “without a shadow of a doubt” after viewing a Family Fare surveillance video and identified Defendant as the individual who committed this robbery during his trial testimony.

Lieutenant Joseph Ferrelli of the Winston-Salem Police Department, who was on duty near the Family Fare on the morning of 29 August 2010, heard a call reporting the robbery and proceeded to the store, where he encountered Mr. Palm. At that time, Mr. Palm described the robber as a black male who wore a gray hooded sweatshirt, black plastic framed sunglasses, light colored khaki pants, and white tennis shoes. Although the robber had facial hair, Mr. Palm could not tell whether he had a full beard or a goatee because the sweatshirt hood was pulled up over his head. After Mr. Palm indicated that the perpetrator had left the store heading south, Lieutenant Ferrelli drove in that direction on University Parkway.

On 29 August 2010, Gregory Slade, who sold newspapers for the Winston-Salem Journal, was working at the corner of Bonhurst and Deacon Boulevard, a location from which he could see the Family Fare. On that morning, Mr. Slade saw Defendant, who was wearing a gray hoodie, running up the street toward the Family Fare. Although Defendant also approached a Pizza Hut, it was not open. Eventually, Mr. Slade noticed Defendant going back and forth between the Pizza Hut and an International House of Pancakes, apparently asking people for rides. After investigating officers approached Mr. Slade to find out if he had noticed anyone running in the area, he pointed out Defendant, who was heading toward the parking area of a nearby pawnshop.

**STATE v. GRAY**

[225 N.C. App. 431 (2013)]

Upon receiving this information, Lieutenant Ferrelli and Officers Sarah Allen and Kymberli Oakes detained Defendant in the pawnshop parking lot. Although the morning was a hot one and although the pawnshop was located about two tenths of a mile from the Family Fare, Defendant was not sweating or out of breath. Lieutenant Ferrelli found a gray sweatshirt and “swim goggles” in the dumpster beside the International House of Pancakes. Officers Oakes and Allen, who frisked Defendant, seized a silver box cutter, a scarf, a pair of gloves, and \$238.00 in cash, \$55.00 of which was in Defendant’s wallet and \$183.00 of which was in his pocket. According to an identification card found on his person, Defendant lived near the area at which he was detained.

2. Defendant’s Evidence

Defendant testified that he worked a 3:00 to 11:00 p.m. shift at Hanes Brands during August 2010. Among other things, Defendant was required to break down boxes in the course of his work. Defendant used a box cutter in connection with this aspect of his work, since the tape was hard to remove by hand. On the morning of 29 August 2010, Defendant put on his pants without giving any thought to whether a box cutter might be in his pocket.

After taking his wife to work, Defendant decided to get shoes for his step-son using money that he had received from his wife. However, Defendant’s car broke down and could not be restarted. Once Defendant, with some assistance from a couple of passers-by, had pushed his car into a parking lot near the Family Fare, he decided to walk home. As he was walking toward his residence, he was stopped by the police near the pawnshop. At the time that he was detained, Defendant had a box cutter, a scarf, a pair of gloves, his wallet, an identification card, and about \$230.00 on his person or in his wallet. Defendant denied having robbed the Family Fare.

B. Procedural History

On 29 August 2010, a magistrate’s order was issued charging Defendant with robbery with a dangerous weapon. On 24 January 2011, the Forsyth County grand jury returned a bill of indictment charging Defendant with robbery with a dangerous weapon. On 8 August 2011, Defendant filed a motion seeking to suppress certain evidence seized at the time that he was taken into custody. On 9 August 2011, Defendant filed a motion seeking to have any identification testimony delivered by Mr. Palm suppressed. Defendant’s suppression motions came on for hearing before Judge Mark E. Klass at

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[225 N.C. App. 431 (2013)]

the 9 August 2011 criminal session of the Forsyth County Superior Court. At the conclusion of this suppression hearing, Judge Klass denied Defendant's motions.

The charge against Defendant came on for trial before the trial court and a jury at the 3 October 2011 criminal session of the Forsyth County Superior Court. On 4 October 2011, the jury returned a verdict convicting Defendant of robbery with a dangerous weapon. After accepting the jury's verdict, the trial court entered a judgment sentencing Defendant to a term of sixty to eighty-one months imprisonment. Defendant noted an appeal to this Court from the trial court's judgment.

## II. Legal Analysis

### A. Relevant Facts

At the hearing held with respect to Defendant's suppression motions, the State notified Judge Klass that Defendant's trial counsel had previously represented Mr. Slade, whom the State intended to call as a witness at Defendant's trial. Despite the fact that Mr. Slade's name had been mentioned during the suppression hearing, he did not testify at that proceeding. Although Defendant's trial counsel indicated that he was comfortable with going forward with the suppression hearing given that Mr. Slade had not testified, he expressed "a little concern[]" because he did "possess . . . confidential information about" Mr. Slade and acknowledged "that Mr. Slade would have to give his permission." As a result, Judge Klass decided to proceed with the suppression hearing on the understanding that the issue would be revisited after the hearing was concluded while stating that he did not "see a problem," since "[t]hat's 2003[.]" since "[i]t's not in any relationship to this case[.]" and since Mr. Slade "would just be a witness for the State."

After denying both of Defendant's suppression motions, Judge Klass resumed consideration of the conflict of interest issue by suggesting that the jury selection process be commenced subject to the understanding that Mr. Slade would be questioned concerning any objection he might have to the representation of Defendant by his former counsel. However, Defendant's trial counsel expressed a concern that Defendant, in addition to Mr. Slade, would have to consent to his continued representation. At that point, Judge Klass ascertained that Defendant understood that his trial counsel had previously represented Mr. Slade in an unrelated matter and indicated the belief that the prior representation "may not be relevant." As this colloquy

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between Judge Klass and Defendant was proceeding, Defendant's trial counsel interjected that, while he had consulted "the ethics manual," he "couldn't find any clear answer" and stated that he "would feel more comfortable at least making a call to the [North Carolina State Bar] and just asking them essentially does [Defendant] need to consent." In an effort to obviate the necessity for contacting the State Bar, Judge Klass inquired if Defendant had "any objection to [his trial counsel] representing [him] knowing that eight years ago he represented one of the witnesses[.]" In response, Defendant indicated that he would "have to talk it over with [his] family." At the conclusion of a fifteen minute recess, Defendant's trial counsel stated that Defendant "has said that he's concerned about the conflict of interest" and that Defendant "wanted another lawyer."

Upon learning of Defendant's concerns, Judge Klass indicated that, while he continued to believe that there was no conflict, he would allow Defendant's trial counsel to contact the State Bar. After Mr. Slade's arrival, Judge Klass ascertained from the prosecutor that Mr. Slade was willing to waive any conflict arising from his previous representation by Defendant's trial counsel and engaged in a colloquy with Mr. Slade in order to satisfy himself that Mr. Slade's waiver was knowing and voluntary.<sup>1</sup> In view of the fact that the State Bar did not respond to an inquiry that day, the case against Defendant was continued. On the following day, an Assistant Ethics Counsel with the State Bar advised Judge Klass via e-mail that, "[b]ecause the former client has consented, the lawyer's ability to represent the current client is not affected," so that "the current client's consent is not required for the lawyer to continue the representation."<sup>2</sup>

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1. At some point on 10 August 2011, Mr. Slade executed a written waiver in which he acknowledged that his former attorney represented Defendant, that he would be called as a witness for the State at Defendant's trial, and that he "waive[d] any and all conflicts and consent[ed] to having [Defendant's trial counsel] conduct a cross examination . . . understanding that this may infringe upon [his] attorney-client privilege."

2. Although the parties have discussed in some detail the extent, if any, to which the advice provided by the State Bar was correct in light of the relevant provisions of Revised Rule of Professional Conduct 1.7 and 2003 Formal Ethics Opinion 14, we need not resolve that issue given that our responsibility is to evaluate the validity of Defendant's constitutional claim, which is a separate issue from the extent, if any, to which Defendant's trial counsel was entitled, as a matter of professional ethics, to continue to represent Defendant without obtaining an informed waiver from Defendant of the potential conflict arising from his previous representation of Mr. Slade.

## STATE v. GRAY

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At the time that the case against Defendant was called for trial on 3 October 2011, the State informed the trial court that the case had been set for trial “a couple of months ago,” at which point “an issue arose regarding whether or not [Defendant’s trial counsel] had to conflict out of representing [Defendant] because of at some point a couple of years ago he did represent one of the State’s witnesses, Gregory Slade, on a criminal charge of failure to register;” that Judge Klass had “held it open for us to receive confirmation from the State Bar as to whether or not [Defendant’s trial counsel] had a duty to withdraw;” and that Judge Klass “did receive information from the State Bar saying that if Mr. Slade executed a waiver of conflict that we were okay to proceed.” In the midst of some discussion about whether a “waiver” was “in the file,”<sup>3</sup> the prosecutor informed the trial court that an inquiry had been made of the State Bar because Defendant “was not wanting to waive.” The trial court did not, however, conduct any additional inquiry into the extent to which Defendant’s trial counsel was operating under a conflict of interest or whether Defendant was willing to knowingly, intelligently, and voluntarily waive any such conflict.

B. Applicable Legal Principles

An individual charged with having committed a crime has a federal and state constitutional right to the effective assistance of counsel. U.S. Const. amend. VI; N.C. Const., art. I, § 23; *Strickland v. Washington*, 466 U.S. 668, 686, 104 S. Ct. 2052, 2063, 80 L. Ed. 2d 674, 692 (1984); *State v. Braswell*, 312 N.C. 553, 561, 324 S.E.2d 241, 247 (1985). “The right to effective assistance of counsel includes the ‘right to representation that is free from conflicts of interest.’” *State v. Bruton*, 344 N.C. 381, 391, 474 S.E.2d 336, 343 (1996) (quoting *Wood v. Georgia*, 450 U.S. 261, 271, 101 S. Ct. 1097, 1103, 67 L. Ed. 2d 220, 230 (1981)). Ordinarily, in order to obtain relief from a criminal conviction on the basis of an ineffective assistance of counsel claim, the defendant must establish that he or she received deficient representation and that these deficiencies prejudiced him or her. *Strickland*, 466 U.S. at 687, 104 S. Ct. at 2064, 80 L. Ed. 2d at 693; *State v. Allen*, 360 N.C. 297, 316, 626 S.E.2d 271, 286, *cert. denied*, 549 U.S. 867, 127 S. Ct. 164, 166 L. Ed. 2d 116 (2006). “However, the [United States] Supreme Court has applied a different test when the claim of ineffec-

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3. Although the record is not entirely clear, the “waiver” that was “in the file” was probably the waiver of the conflict executed by Mr. Slade. However, given that the record clearly shows that Defendant never waived the potential conflict identified by his trial counsel, the identity of the item that the trial court observed “in the file” is immaterial to the analysis that we are required to undertake in this case.

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tive assistance is based upon a conflict of interest arising out of an attorney's multiple representation of more than one defendant or party, either simultaneously or in succession, in the same or related matters," given that, "[u]nder such circumstances, questions may arise as to the attorney's loyalty to any individual client." *State v. Phillips*, 365 N.C. 103, 118, 711 S.E.2d 122, 135 (2011), *cert. denied*, \_\_\_ U.S. \_\_\_, 132 S. Ct. 1541, 182 L. Ed. 2d 176 (2012).

The exact standard to be applied when evaluating what relief, if any, should be granted in response to a conflict of interest claim hinges, to a considerable extent, upon the exact procedural context in which the conflict of interest claim has been presented for a reviewing court's consideration. *State v. Choudhry*, 365 N.C. 215, 219, 717 S.E.2d 348, 352 (2011) (stating that "[t]he test to determine whether a defendant is entitled to relief under such circumstances without having to demonstrate prejudice is dependent upon the level of notice given to the trial court and the action taken by that court") (citing *Phillips*, 365 N.C. at 118–20, 711 S.E.2d 122, 135–36 (2011)). On one hand, "reversal [is] automatic when the trial court improperly forced defense counsel to represent codefendants over counsel's objection." *Phillips*, 365 N.C. at 119, 711 S.E. 2d at 136 (citing *Holloway v. Arkansas*, 435 U.S. 475, 488–91, 98 S. Ct. 1173, 1180–82, 55 L. Ed. 2d 426, 437–38 (1978)). In other words, "[i]f a defendant who objects to multiple representation is denied 'the opportunity to show that potential conflicts impermissibly imperil his right to a fair trial,' prejudice is presumed." *Choudhry*, 365 N.C. at 220, 717 S.E. 2d at 352 (quoting *Cuyler v. Sullivan*, 446 U.S. 335, 348, 100 S. Ct. 1708, 1718, 64 L. Ed. 2d 333, 346 (1980)). "[W]hen multiple representation gives rise to a conflict about which an objection has been raised, the trial court must give a defendant the opportunity to show that 'potential conflict impermissibly imperils [the defendant's] right to a fair trial.' " *Phillips*, 365 N.C. at 119, 711 S.E.2d at 136 (alteration in original) (quoting *Cuyler*, 446 U.S. at 348, 100 S. Ct. at 1718, 64 L. Ed. 2d at 346). However, " '[u]nless the trial court knows or reasonably should know that a particular conflict exists, the court need not initiate an inquiry.' " *Id.* at 119, 711 S.E.2d at 136 (alteration in original) (quoting *Cuyler*, 446 U.S. at 347, 100 S. Ct. at 1717, 64 L. Ed. 2d at 346). At such an inquiry, "the trial court is responsible for ensuring that the defendant fully understands the consequences of a potential or actual conflict," including "determining both whether an actual conflict exists and, if so, whether the defendant is knowingly, intelligently, and voluntarily waiving his or her rights to conflict-free representation." *Choudhry*, 365 N.C. at 223, 717 S.E. 2d at 354 (citing *State v. Ballard*,

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180 N.C. App. 637, 642-43, 638 S.E.2d 474, 479 (2006), *disc. review denied*, 361 N.C. 358, 646 S.E. 2d 119 (2007), and *State v. James*, 111 N.C. App. 785, 791, 433 S.E.2d 755, 758-59 (1993)). “In the absence of an objection, the trial court’s failure to inquire into a conflict will not result in a reversal unless the defendant demonstrates that ‘an actual conflict of interest adversely affected his lawyer’s performance.’” *Phillips*, 365 N.C. at 119, 711 S.E.2d at 136 (quoting *Cuyler*, 446 U.S. at 348, 350, 100 S. Ct. at 1718, 64 L. Ed. 2d at 346-47).<sup>4</sup> In the event that a “possible conflict was ‘sufficiently apparent’ . . . to trigger inquiry by the trial court” and no such inquiry was conducted, the case should be “remanded . . . for a hearing to determine whether a conflict actually existed.” *Phillips*, 365 N.C. at 119-20, 711 S.E.2d at 136 (quoting *Wood*, 450 U.S. at 272, 101 S. Ct. at 1104, 67 L. Ed. 2d at 230-31). As a result, “‘even when a trial court ‘fails to inquire into a potential conflict of interest about which it knew or reasonably should have known,’ ” “the defendant must still establish an actual conflict that ‘adversely affected his counsel’s performance.’” *Phillips*, 365 N.C. at 120, 711 S.E.2d at 136 (quoting *Mickens v. Taylor*, 535 U.S. 162, 164, 173-74, 122 S. Ct. 1237, 1239, 1245, 152 L. Ed. 2d 291, 299, 305 (2002)).

Although the facts of this case are not absolutely identical to any of those which have been previously decided by the United States Supreme Court and the Supreme Court of North Carolina, the record clearly reflects that Defendant refused to waive the potential conflict of interest identified by his trial counsel and requested to be provided with new counsel at the hearing held before Judge Klass and that the trial court was made aware of Defendant’s refusal to waive the potential conflict immediately prior to the beginning of Defendant’s trial.<sup>5</sup> Even so, neither Judge Klass nor the trial court conducted any inquiry into the nature and extent of this potential conflict or whether Defendant did, in fact, wish to knowingly, intelligently, and voluntar-

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4. The same rule applies when “the trial court’s inquiry is inadequate or incomplete.” *Choudry*, 365 N.C. at 224, 717 S.E.2d at 355.

5. Although the State emphasizes that Defendant did not request the appointment of replacement counsel and that his trial counsel did not provide any additional information concerning the nature and extent of any conflict-related problems that would result from the necessity for him to cross-examine Mr. Slade when the case was called for trial, the record clearly reflects that Defendant refused to waive the conflict in the proceedings held before both Judge Klass and the trial court and requested to be provided with new counsel during the hearing held before Judge Klass. Under that set of circumstances, we do not believe that the fact that Defendant and his trial counsel did not take additional actions over and above those described in the text of this opinion has any bearing on the proper outcome in this proceeding.



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ily waive it.<sup>6</sup> Thus, we believe that Defendant, like the defendants in *Holloway*, was effectively forced to go to trial while still represented by his trial counsel, who had previously represented one of the State's witnesses and who acknowledged being in the possession of confidential information which might be useful for purposes of cross-examining that witness, despite having clearly objected to continued representation by that attorney.<sup>7</sup> As a result, given that prejudice is presumed under such circumstances, Defendant is entitled to a new trial.

In seeking to persuade us to reach a different result, the State argues, in reliance upon *Choudhry*, that Defendant must show "an actual conflict of interest that adversely affected his defense counsel's performance" as a precondition for an award of appellate relief. 365 N.C. at 224. 717 S.E. 2d at 355. We do not find this logic persuasive, however, since Defendant, unlike the defendant in *Choudhry*, objected to continued representation by his trial counsel and affirmatively asked to be provided with new counsel. Thus, since the showing held necessary in *Choudhry* is only required in cases involving "defendant[s] who raised no objection at trial," *Cuyler*, 446 U.S. at 348, 100 S. Ct. at 1718, 64 L. Ed. 2d at 346, and since Defendant, contrary to the position asserted in the State's brief did object to continued representation by his trial counsel, Defendant was not required to make the showing deemed necessary by the State in order to be entitled to an award of appellate relief. As a result, since Defendant was effectively compelled to go to trial despite having objected to the potential conflict of interest under which his trial counsel labored, he is entitled to receive, and hereby does receive, a new trial.

## NEW TRIAL.

Judges McGEE and STEELMAN concur.

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6. The fact that Mr. Slade waived the conflict arising from his former representation by Defendant's trial counsel and consented to allowing Defendant's trial counsel to cross-examine him despite the implications of the attorney-client privilege inherent in such a cross-examination does not suffice to justify a refusal to award appellate relief in this case given that the legal rights at issue in this proceeding belonged to Defendant rather than Mr. Slade and given that Judge Klass and the trial court, who were put on notice of Defendant's refusal to waive this potential conflict of interest, did not respond to Defendant's objection by conducting an appropriate inquiry.

7. At the time that Mr. Slade testified on behalf of the State, Defendant's trial counsel cross-examined him concerning a prior statement that he had made to police, where the individual that Mr. Slade identified as Defendant had been at particular times, what the individual that Mr. Slade identified as Defendant had been wearing, and the criminal offenses of which Mr. Slade had been convicted.

**STATE v. JOHNSON**

[225 N.C. App. 440 (2013)]

STATE OF NORTH CAROLINA

v.

DAVID HAROLD JOHNSON, DEFENDANT

No. COA12-827

Filed 5 February 2013

**1. Search and Seizure—probable cause—roadside search**

The trial court correctly concluded in a prosecution for multiple drug offenses, including trafficking, that officers had probable cause to search defendant where defendant smelled of marijuana, the troopers had discovered in defendant's car a scale of the type used to measure drugs, a drug dog had alerted in defendant's car, and during a pat-down the troopers had noticed a blunt object in the inseam of defendant's pants during a pat down.

**2. Search and Seizure—roadside search inside clothes—sufficient basis**

In a prosecution involving drug trafficking, there was sufficient information to provide a basis for believing that contraband was present beneath defendant's underwear. Even assuming that what followed was a strip search, *State v. Battle*, 202 N.C. App. 376, did not apply and the trial court did not err by denying defendant's motion to suppress.

**3. Search and Seizure—roadside search inside clothes—steps to protect privacy**

Officers doing a roadside search of defendant by pulling his pants away from his body took reasonable steps to protect defendant's privacy where the only private areas subjected to search by the troopers remained covered by defendant's compression shorts and they did not remove his pants or outer underwear to retrieve the package of drugs from his pants.

**4. Evidence—officer's opinion—scales of type used for drugs**

The trial court did not err in a prosecution for multiple drug offenses by admitting an officer's testimony that the scales found in defendant's car were of the type often used to measure drugs, especially marijuana. The State did not indict defendant on the theory that the scales were drug paraphernalia, but that a wrapping used to contain the cocaine, heroin, and marijuana found in his boxers was drug paraphernalia.

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**5. Drugs—paraphernalia—scales—indicted for cellophane wrap**

Defendant's argument that there was insufficient evidence that scales found in his car were used as drug paraphernalia was irrelevant where the State indicted him for using a cellophane wrap found in his boxer shorts as a drug container, not for using the scales as drug paraphernalia.

**6. Drugs—no independent testing of marijuana—trooper's opinion**

Although defendant argued there was insufficient evidence to support his conviction for misdemeanor possession of marijuana because there was no independent testing of the green, leafy substance found in the cellophane wrapping, Trooper Hicks's testimony identifying the "green vegetable substance" introduced at trial as marijuana constituted substantial evidence that the substance in question was, in fact, marijuana.

**7. Constitutional Law—double jeopardy—possession or transportation of cocaine or heroin**

Defendant conceded that there was case law directly contrary to his position that punishing him for possession or transportation of cocaine and heroin violated the Double Jeopardy Clause.

Appeal by defendant from judgments entered 2 February 2012 by Judge Thomas H. Lock in Superior Court, Johnston County. Heard in the Court of Appeals 13 December 2012.

*Attorney General Roy A. Cooper, III by Assistant Attorney General Marc X. Sneed, for the State.*

*Parish & Cooke by James R. Parish, for defendant-appellant.*

STROUD, Judge.

David Harold Johnson ("defendant") appeals from the trial court's denial of his motion to suppress evidence seized from his person and subsequent convictions for trafficking in cocaine by possession and transportation, trafficking in heroin by possession and transportation, possession of marijuana, and possession of drug paraphernalia. For the following reasons, we affirm the trial court's denial of defendant's motion to suppress and find no error in his trial.

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**I. Background**

On 1 August 2011, defendant was indicted for trafficking in cocaine by possession and transportation, trafficking in heroin by possession and transportation, possession of marijuana, possession of drug paraphernalia, driving without a license, resisting, delaying, or obstructing a public officer, and assault on a government officer. Defendant moved to suppress evidence seized from his person as fruits of an illegal search. The trial court denied defendant's motion by order entered 16 February 2012. Defendant pleaded not guilty and proceeded to jury trial. The evidence at trial showed that:

On 15 June 2011, defendant was travelling south on I-95 in Johnston County. Trooper Michael Hicks with the North Carolina Highway Patrol observed defendant's car following the car in front of him too closely and saw defendant hold up a cell phone without putting it to his ear. Trooper Hicks pulled defendant over for following too closely and texting while driving. When he approached defendant's vehicle he noticed the strong odor of marijuana coming from defendant's vehicle. Trooper Hicks asked defendant to step out and sit in the front passenger seat of his patrol car.

Trooper Hicks asked if he could frisk defendant for weapons and defendant agreed. In the course of his frisk, Trooper Hicks did not find anything that appeared to be a weapon, though he felt a blunt object in the inseam of defendant's pants. After the frisk, defendant sat in the front seat of Trooper Hicks's patrol car while Trooper Hicks ran defendant's license information. While in the patrol car, Trooper Hicks still smelled a strong odor of marijuana coming from defendant.

Trooper Hicks advised defendant that he had noticed the strong odor of marijuana both on defendant and in defendant's car. Defendant gave Trooper Hicks permission to search his pockets and his car. In his initial search, Trooper Hicks found nothing in defendant's pockets and found only some receipts, a parking ticket, a scale of the type typically used by drug dealers, and an open package of boxer briefs in the trunk. A K-9 unit arrived with a dog trained in drug detection. The troopers ran the dog through the car and he alerted to the odor of contraband in the car's trunk and on the driver's seat.

Trooper Hicks proceeded to search defendant's person, but found nothing in defendant's outer clothing. Trooper Hicks then placed defendant on the side of his vehicle, so that the vehicle was between defendant and the travelled portion of the highway. Other troopers

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stood around defendant to prevent passers-by from seeing him. Trooper Hicks then pulled the front waistband of defendant's pants away from his body and looked inside. Defendant was wearing two pairs of underwear—an outer pair of boxer briefs and an inner pair of athletic compression shorts. Between the two pairs of underwear Trooper Hicks discovered a cellophane package containing several smaller packages. When Trooper Hicks saw the package, defendant turned, hit another trooper in the face and fled for the nearby woods. The troopers quickly apprehended defendant. Trooper Hicks cut open the package and found that the smaller packages contained a green, leafy substance that, in his opinion, was marijuana; a tan, rock-like substance, later identified by chemical testing to be heroin; and a white powdery substance later identified by chemical testing to be cocaine.

Defendant moved to dismiss all charges against him. The trial court granted defendant's motion as to driving without a license, but denied his motion as to all other charges. The jury found defendant not guilty of assaulting a government officer and guilty of the remaining offenses. Defendant was sentenced to 225-279 months confinement in the Division of Adult Correction for trafficking in heroin, and a consecutive sentence of 35-42 months confinement for trafficking in cocaine, possession of marijuana, resisting a public officer, and possession of drug paraphernalia. Defendant gave notice of appeal in open court.

## II. Motion to Suppress

Defendant first argues that the trial court should have granted his motion to suppress the cocaine, heroin, and marijuana found in his boxers because the search was neither incident to arrest nor pursuant to exigent circumstances justifying a strip search.

### A. Standard of Review

It is well established that the standard of review in evaluating a trial court's ruling on a motion to suppress is that the trial court's findings of fact are conclusive on appeal if supported by competent evidence, even if the evidence is conflicting. In addition, findings of fact to which defendant failed to assign error are binding on appeal. Once this Court concludes that the trial court's findings of fact are supported by the evidence, then this Court's next task is to determine whether the trial court's conclusions of law are supported by the find-

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ings. The trial court's conclusions of law are reviewed *de novo* and must be legally correct.

*State v. Eaton*, \_\_\_\_ N.C. App. \_\_\_\_, \_\_\_\_, 707 S.E.2d 642, 644-45 (quotation marks and citation omitted), *disc. rev. denied*, 365 N.C. 202, 710 S.E.2d 25 (2011).

B. Search Based on Probable Cause and Exigent Circumstances

**[1]** Defendant does not challenge any of the trial court's findings of facts and only challenges conclusions of law 6, 7, and 8. Therefore, the findings of fact are binding on appeal, *id.*, and we consider any challenge to the other conclusions abandoned, N.C.R. App. P. 28(a).

The trial court made the following relevant findings of fact and conclusions of law:

7. Trooper Hicks immediately detected the strong odor of green or raw marijuana coming from defendant's vehicle. . . .

9. Trooper Hicks asked defendant to sit in the front passenger seat of the patrol car and defendant complied. Before defendant got in the patrol car, Trooper asked defendant if he could frisk defendant for any weapons and defendant agreed. While frisking defendant, Trooper Hicks felt a blunt object in the inseam of defendant's pants, but he did not believe the object to be a weapon.

. . . .

11. Trooper Hicks had not told defendant he was under arrest and defendant in fact was not under arrest while seated in the patrol vehicle.

. . . .

13. Defendant stated that he had been in Virginia visiting his girlfriend, the mother of his child. Defendant said he could not recall the name of the place he had visited in Virginia.

14. Trooper Hicks asked defendant about the marijuana odor and defendant replied that marijuana had been used in his vehicle the day before. Defendant said that he had been eating chicken in the car before Trooper

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Hicks stopped him. Trooper Hicks asked defendant if he had ever been arrested, and defendant stated that he had been arrested for traffic violations, for fighting, and for marijuana use.

....

16. While Trooper Hicks was talking with the defendant in his patrol car, another member of the Asheville crime interdiction unit, Trooper Harold Stines, who also was working in the area, arrived on the scene with a canine. Trooper Stines and the dog named A-Rod had been trained and certified together in drug detection by the U.S. Customs and Border Protection Agency.

....

17. Trooper Hicks asked Trooper Stines to walk around defendant's vehicle with the dog. A-Rod exhibited a change in behavior in the area of the vehicle's trunk, indicating the presence of a controlled substance there. Trooper Stine opened the trunk, placed A-Rod inside, and the dog assumed a "final response" position, confirming the presence of some controlled substance. Trooper Stine then place [sic] A-Rod inside the passenger area of the vehicle, and A-Rod alerted in the driver's seat. Trooper Stines himself could smell the odor of raw marijuana coming from the vehicle.

18. Other troopers with the Asheville crime interdiction unit also arrived on the scene. The troopers searched defendant's vehicle. They found no controlled substances, but they found in the passenger compartment an opened package of boxer-briefs underwear, a parking citation issued by the City of New York on 12 June 2011 at 5:40 p.m., and a receipt from a McDonald's restaurant in the Bronx, New York, reflecting a purchase made on 11 June 2011 at 11:58 p.m. They also found in the trunk a digital scale of the type commonly used by drug dealers for the weighing of illegal drugs.

....

20. After the troopers had completed their search of defendant's vehicle, Trooper Hicks told defendant that

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he still smelled marijuana about defendant's person and that he was going to search his person. At that time, Trooper Hicks had decided to issue a citation to defendant for possession of drug paraphernalia, but he did not disclose that intent to defendant.

21. Trooper Hicks asked defendant to remove his shoes, but the trooper found nothing in them. Trooper Hicks then asked the defendant to get out of the patrol vehicle and Trooper Hicks and the other troopers, a total of six, formed a semicircle around him.

22. Other than telling Trooper Hicks in the patrol car that he could search defendant's pockets, defendant did not consent to a search of his person.

23. The troopers stationed themselves and the defendant on the passenger side of a patrol car, and they positioned themselves around the defendant in such a manner as to block a view of the defendant by any passersby travelling on the interstate.

24. Trooper Hicks began to search defendant's outer clothing and again felt the blunt object in the inseam of defendant's pants. As Trooper Hicks frisked the area around defendant's groin and inner thighs, defendant turned his body away from the trooper.

25. Trooper Hicks pulled the front waistband of defendant's pants forward and looked inside. He could see that defendant was wearing two pairs of underwear. The outer pair was a pair of boxer-briefs like those found in the passenger compartment of defendant's vehicle. The inner pair was a pair of compression type athletic shorts with the protective cup missing. In between the two pairs of underwear, outside the place of the missing protective cup, Trooper Hicks observed a softball sized mound of cellophane.

26. Trooper Hicks reached inside defendant's waistband and removed the cellophane wrapped package. It appeared to be layers of cellophane wrapped around coffee grounds and smaller packages of controlled substances.



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27. As Trooper Hicks removed the package from defendant's pants, defendant suddenly wheeled, struck one of the troopers, and ran toward the woods by the highway. The troopers immediately overtook defendant, subdued him, and arrested him.

28. The troopers did not remove or pull down defendant's pants while searching him. Defendant was wearing his pants with the waist of the pants low around his buttocks. Defendant's private areas were never exposed during the search.

**CONCLUSIONS OF LAW:**

. . . .

4. Trooper Hicks also had the right to search defendant's vehicle without a warrant under exigent circumstances based on probable cause to believe that such a search would yield evidence of controlled substances because of the strong odor of marijuana coming from the vehicle, the alerts or indications of the presence of controlled substances exhibited by the dog specially trained in drug detection, and defendant's apparent deceptive and misleading statements as to his itinerary.

5. Following the troopers' discovery of the digital scaled inside defendant's vehicle, Trooper Hicks had probable cause to arrest defendant for a violation of NCGS 90-113.22(possession of drug paraphernalia) committed in the trooper's presence.

. . . .

7. Assuming *arguendo* that Trooper Hicks could not search defendant incident to arrest, the trooper had probable cause to conduct a warrantless search of defendant's person under exigent circumstances based on the strong odor of marijuana about his person, the alerts exhibited by the drug dog in the driver's seat of defendant's vehicle, the discovery of the digital scales during the search of defendant's vehicle, and defendant's apparent deceptive and misleading statements as to his itinerary.

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8. The troopers took necessary and reasonable precautions to guard against public exposure of defendant's private areas during the search of his person, and the search of his private areas was not constitutionally intolerable in its intensity or scope.

9. None of defendant's federal or state constitutional rights were violated by the stop of his vehicle, the search of his vehicle or person, or the manner in which the search of his person was conducted.

Defendant argues that he was subjected to a strip search requiring probable cause and exigent circumstances and that the trial court erred in concluding that the search was constitutional based on exigent circumstances. For the following reasons, we hold that the trial court correctly concluded that the troopers had probable cause to search defendant for contraband, exigent circumstances to search him without a warrant, and had conducted the search of defendant's person reasonably.<sup>1</sup>

The governing premise of the Fourth Amendment is that a governmental search and seizure of private property unaccompanied by prior judicial approval in the form of a warrant is *per se* unreasonable unless the search falls within a well-delineated exception to the warrant requirement. One such exception exists when there are exigent circumstances justifying a warrantless search. Probable cause has been defined as a reasonable ground of suspicion, supported by circumstances sufficiently strong in themselves to warrant a cautious man in believing the accused to be guilty.

*State v. Yates*, 162 N.C. App. 118, 122, 589 S.E.2d 902, 904 (2004) (citations, quotation marks, and ellipses omitted).

In *Yates*, we held that where the searching officer noticed a strong odor of marijuana about the defendant's person, that officer had probable cause to search the defendant. *Id.* at 123, 598 S.E.2d at 905. We further concluded that because "narcotics can be easily and quickly hidden or destroyed, especially after defendant received notice of [the officer's] intent to discover whether defendant was in

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1. Because we conclude that the troopers lawfully searched defendant without a warrant, pursuant to probable cause and under exigent circumstances, we need not reach the issue of whether the search was incident to arrest.

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possession of marijuana . . . there were sufficient exigent circumstances justifying an immediate warrantless search.” *Id.*

In the present case, there was evidence not only that defendant smelled of marijuana, but that the troopers had discovered in his car a scale of the type used to measure drugs, a drug dog had alerted in his car, including on the driver’s seat, and during a pat-down the troopers had noticed a blunt object in the inseam of defendant’s pants. We hold that these facts, as found by the trial court, support conclusion 7 that the troopers searched defendant’s person with probable cause and that, for the reasons stated in *Yates*, *see id.*, the trial court did not err in concluding that the troopers did so in exigent circumstances sufficient to justify a warrantless search.

[2] Having concluded that the initiation of the search was valid, we must consider whether the conduct of the search was reasonable.

The Fourth Amendment of the United States Constitution and Article 1 § 20 of the North Carolina Constitution preclude only those intrusions into the privacy of the body which are unreasonable under the circumstances. In determining whether an officer’s conduct was reasonable in executing a search of the defendant’s person, the trial court must balance the need for the particular search against the invasion of personal rights that the search entails. Courts must consider the scope of the particular intrusion, the manner in which it is conducted, the justification for initiating it, and the place in which it is conducted.

*State v. Fowler*, \_\_\_\_ N.C. App. \_\_\_\_, \_\_\_\_, 725 S.E.2d 624, 627-28 (2012) (citations and quotations marks omitted). This Court has

emphasized that deeply imbedded in our culture is the belief that people have a reasonable expectation not to be unclothed involuntarily, to be observed unclothed or to have their ‘private’ parts observed or touched by others. Accordingly, in *Battle*, we noted that a valid search incident to arrest will not normally permit a law enforcement officer to conduct a roadside strip search. Rather, in order for a roadside strip search to pass constitutional muster, there must be both probable cause and exigent circumstances that show some significant government or public interest would be endangered were the police to wait until they could conduct the

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search in a more discreet location—usually at a private location within a police facility.

*Id.* (citations and quotation marks omitted).

Defendant argues that we must reverse the trial court's order denying his motion to suppress because it failed to find that the troopers searched him under exigent circumstances justifying a strip search, as required by *State v. Battle*, 202 N.C. App. 376, 688 S.E.2d 805 (2005). We disagree.

Both the U.S. Supreme Court and the courts of this State have been loath to define in precise terms exactly what constitutes a strip search. See *Safford Unified School Dist. No. 1 v. Redding*, 557 U.S. 364, 374, 174 L.Ed. 2d 354, 364 (2009) ("Although Romero and Schwallier stated that they did not see anything when Savana followed their instructions . . . we would not define strip search and its Fourth Amendment consequences in a way that would guarantee litigation about who was looking and how much was seen."); *Battle*, 202 N.C. App. at 381, 688 S.E.2d at 811 (observing that "neither the United States Supreme Court nor the appellate courts of this State have clearly defined the term 'strip search.'").

Despite the absence of a precise definition of a strip search, it is true that the searches that this Court has considered "strip searches" generally consist of direct observation of the private areas of a defendant or the exposure of those private areas. See, e.g., *Fowler*, \_\_\_ N.C. App. at \_\_\_, 725 S.E.2d at 627-28 (search exposed bare buttocks and genitals), *Battle*, 202 N.C. App. at 385-86, 688 S.E.2d at 814 (officer unbuttoned and lowered defendant's pants, examined defendant's buttocks and reached into defendant's underwear at the level of defendant's pubic hair). Although defendant was able to avoid that level of exposure by wearing two pairs of underwear, our holding does not rely upon defendant's extra underwear, since a holding that turned on that fact "would guarantee litigation about who was looking and how much was seen." *Redding*, 557 U.S. at 374, 174 L.Ed. 2d at 364; see *Florence v. Board of Chosen Freeholders of County of Burlington*, \_\_\_ U.S. \_\_\_, \_\_\_, 182 L.Ed. 2d 566, 574 (2012) ("The term ['strip search'] is imprecise. It may refer simply to the instruction to remove clothing while an officer observes from a distance of, say, five feet or more; it may mean a visual inspection from a closer, more uncomfortable distance; it may include directing detainees to shake their heads or to run their hands through their hair to dislodge what might be hidden there; or it may involve instructions to raise arms, to

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display foot insteps, to expose the back of the ears, to move or spread the buttocks or genital areas, or to cough in a squatting position. In the instant case, the term does not include any touching of unclothed areas by the inspecting officer.”); *see also*, *U.S. v. Dorlouis*, 107 F.3d 248, 256 (4th Cir. 1997) (concluding that a search where the officers placed the defendant in a police van, removed the defendant’s pants, but kept his boxer shorts on, was not an unconstitutional strip search because of the nature of the search without deciding the significance of the fact that defendant kept his boxer shorts on). The level of defendant’s exposure is, nevertheless, relevant to the overall reasonableness of the search.

Although *Battle* held that a roadside strip search must be pursuant to probable cause and exigent circumstances, *id.* at 388, 688 S.E.2d at 815, courts have generally focused on whether the content of the suspicion against the defendant specifically indicated that he was hiding contraband in his underwear or near his private areas. *See Redding*, 557 U.S. at 376-77, 174 L.Ed. 2d at 365 (“In sum, what was missing from the suspected facts that pointed to Savana was any indication of danger to the students from the power of the drugs or their quantity, and any reason to suppose that Savana was carrying pills in her underwear.” (emphasis added)); *Battle*, 202 N.C. App. at 402, 688 S.E.2d at 824 (“Most importantly, the confidential informant provided no information that Defendant would have drugs on her person, much less hidden in her underwear.”); *State v. Stone*, 362 N.C. 50, 54, 653 S.E.2d 414, 417 (2007) (describing our Supreme Court’s *per curiam* opinion in *State v. Smith*, 342 N.C. 407, 407, 464 S.E.2d 45, 46 (1995) as upholding the validity of a strip search “where the officers had specific information that cocaine was hidden in the defendant’s crotch.”). Given this emphasis, we held in *State v. Robinson* that “the mode of analysis outlined in *Battle* [requiring exigent circumstances justifying a roadside strip search] and adopted in *Fowler* only applies in the event that the investigating officers lack a specific basis for believing that a weapon or contraband is present beneath the defendant’s underclothing.” *State v. Robinson*, \_\_\_ N.C. App. \_\_\_, \_\_\_, 727 S.E.2d 712, 722 (2012).

Here, even assuming that the search was indeed a “strip search,” *Battle* does not apply because there was sufficient information to provide “a sufficient basis for believing that” contraband was present beneath defendant’s underwear. *Id.*; *see Battle*, 202 N.C. App. at 398, 688 S.E.2d at 821 (noting that in *Redding*, the U.S. Supreme Court invalidated a strip search because “the content of the suspicion

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failed to match the degree of intrusion.’ ” (quoting *Redding*, 557 U.S. at 375, 174 L.Ed. 2d at 364)). The trial court found that a drug dog had alerted in the back of defendant’s car and again in the driver’s seat and troopers detected the odor of marijuana on defendant’s person. The troopers searched the car and defendant’s outer clothing without finding the source of the marijuana odor, which was still strong. Defendant turned his body away from the searching officer when he frisked the area around defendant’s groin and inner thigh, and, most significantly, Trooper Hicks felt a blunt object in defendant’s crotch area during the pat-down, directly implicating defendant’s undergarments.

These circumstances are similar to those in *Robinson*, where we concluded that there was an “ample basis” for believing that contraband would be found in the defendant’s undergarments when “various items of drug-related evidence were observed in the vehicle in which Defendant was riding, [] Defendant made furtive movements towards his pants, and [] Detective Tisdale felt a hard object between Defendant’s buttocks.” *Robinson*, \_\_\_ N.C. App. at \_\_\_, 727 S.E.2d at 722. As in *Robinson*, we conclude that the facts in the case *sub judice* provide an ample basis for believing that contraband would be found in defendant’s undergarments.

[3] Having concluded that there was a specific basis for believing that contraband was present in defendant’s undergarments, the next question is whether the searching officers took reasonable steps to protect defendant’s privacy. See *Robinson*, \_\_\_ N.C. App. at \_\_\_, 727 S.E.2d at 723. Here, the troopers placed defendant on the side of Trooper Hicks’s vehicle so that the vehicle blocked them from the travel lanes of the highway and formed a wall around defendant as he was being searched so that he could not be seen by passers-by. The troopers never actually removed or pulled down his pants and never examined any of his “private parts”. Defendant was wearing two layers of clothing underneath his pants. The first layer was a pair of boxer-briefs of the type found in the passenger compartment of his car. Underneath the boxer-briefs, defendant was wearing athletic-style compression shorts with a compartment for a protective cup. The only private areas subjected to search by the troopers remained covered by defendant’s compression shorts and they did not remove his pants or outer underwear to retrieve the package from his pants.

We hold that these facts, as found by the trial court, support the trial court’s conclusion that “[t]he troopers took necessary and reasonable precautions to guard against any public exposure of defendant’s private areas during the search of his person, and the search of

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his private areas was not constitutionally intolerable in its intensity or scope.” Therefore, we affirm the trial court’s order denying defendant’s motion to suppress the evidence seized from his person.

## III. Opinion that Scales are Drug Paraphernalia

[4] Defendant contends that under N.C. Gen. Stat. § 8C-1, Rule 701, the trial court erred in admitting, over his objection, the testimony of Trooper Hicks that the scales found in his car were of the type often used to measure drugs, “especially marijuana.” Defendant argues that it was prejudicial error to admit this opinion because he had been charged with possession of drug paraphernalia.

“Defendant objected during his trial, but even if the complaining party can show that the trial court erred in its ruling, relief will not ordinarily be granted absent a showing of prejudice.” *State v. Stokes*, \_\_\_ N.C. App. \_\_\_, \_\_\_, 718 S.E.2d 174, 178 (2011) (citation, quotation marks, and brackets omitted). The State did not indict defendant on the theory that the scales were drug paraphernalia, but that the wrapping used to contain the cocaine, heroin, and marijuana found in his boxers was drug paraphernalia. Even assuming that it was error for the trial court to admit the opinion evidence that the scales were of the type normally used to weigh marijuana, it is difficult to see how defendant was prejudiced, given that the item for which he *was* charged with possession of drug paraphernalia contained three types of controlled substances. Therefore, defendant’s argument on this point is unavailing.

## IV. Motion to Dismiss

Defendant next argues that the trial court erred in denying his motion to dismiss the misdemeanor charges of possession of drug paraphernalia and possession of marijuana because there was insufficient evidence to reach the jury on either charge.

## A. Standard of Review

The standard of review for a motion to dismiss is well known. A defendant’s motion to dismiss should be denied if there is substantial evidence of: (1) each essential element of the offense charged, and (2) of defendant’s being the perpetrator of the charged offense. Substantial evidence is relevant evidence that a reasonable mind might accept as adequate to support a conclusion. The Court must consider the evidence in the

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light most favorable to the State and the State is entitled to every reasonable inference to be drawn from that evidence. Contradictions and discrepancies do not warrant dismissal of the case but are for the jury to resolve.

*State v. Johnson*, 203 N.C. App. 718, 724, 693 S.E.2d 145, 148 (2010) (citations and quotation marks omitted).

B. Sufficiency of the Evidence of Possession of Drug Paraphernalia

[5] Defendant argues that there was insufficient evidence that the scales found in his car were used as drug paraphernalia and that therefore the trial court erred in denying his motion to dismiss as to that charge. As with his prior argument, defendant fails to recognize that the State indicted him for using the cellophane wrap found in his boxer shorts as a drug container, not for using the scales as drug paraphernalia. Therefore, defendant's arguments as to evidence relating to the scales are irrelevant.

N.C. Gen. Stat. § 90-113.21 defines drug paraphernalia in part as "[c]ontainers and other objects for storing or concealing controlled substances." N.C. Gen. Stat. § 90-113.21(a)(10) (2011). Defendant does not argue that the State failed to show that the cellophane wrapping of the drugs found on his person was used "for storing or concealing controlled substances." *Id.* Any arguments to that effect are, therefore, deemed abandoned. N.C.R. App. P. 28(a). We find no error in the trial court's denial of his motion to dismiss as to that charge.

C. Sufficiency of the Evidence of Possession of Marijuana

[6] Defendant next argues that there was insufficient evidence to support his conviction for misdemeanor possession of marijuana because there was no independent testing of the green, leafy substance found in the cellophane wrapping.

The State indicted defendant for possession of marijuana under N.C. Gen. Stat. § 90-95(a)(3).<sup>2</sup> To convict a defendant of Class 3 misdemeanor possession of marijuana, the State must prove (1) that the defendant knowingly possessed a controlled substance and (2) that

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2. The indictment did not include any information as to weight, therefore, as conceded by the State at trial, the indictment charged defendant only with Class 3 misdemeanor possession of marijuana. See *State v. Partridge*, 157 N.C. App. 568, 571, 579 S.E.2d 398, 400, *disc. rev. dismissed as improvidently granted*, 357 N.C. 572, 597 S.E.2d 673 (2003); *State v. Land*, \_\_\_ N.C. App. \_\_\_, 733 S.E.2d 588, 593 (2012) ("an indictment for possession of marijuana tracking the language of N.C. Gen.Stat. § 90-95(a)(3), without more, alleges only a Class 3 misdemeanor.").



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the substance was marijuana. *See State v. Harris*, 361 N.C. 400, 403, 646 S.E.2d 526, 528 (2007). In this case, only the second element is contested.

Trooper Hicks testified, without objection, that within the cellophane wrapper, they found “two packages of green vegetable material that is—in my opinion and from my training is marijuana.” It is well established that officers with proper training and experience may opine that a substance is marijuana. *See State v. Ferguson*, 204 N.C. App. 451, 456-57, 694 S.E.2d 470, 475-76 (2010) (“[O]ur appellate courts have never held that an officer must be tendered as an expert before identifying a particular substance as marijuana. . . . [Furthermore,] it is not necessary, in the absence of an objection, for a witness to be formally tendered or accepted as an expert in order for that witness to be allowed to present expert testimony.”). Trooper Hicks had nearly 20 years of experience with the Highway Patrol, including over 300 hours of drug interdiction training and special training in the identification of controlled substances. “Though direct evidence may be entitled to much greater weight with the jury, the absence of such evidence does not render the opinion testimony insufficient to show the substance was marijuana.” *State v. Fletcher*, 92 N.C. App. 50, 57, 373 S.E.2d 681, 686 (1988) (citation omitted). Trooper Hicks’s testimony identifying the “green vegetable substance” introduced at trial as marijuana constitutes substantial evidence that the substance in question was, in fact, marijuana. Therefore, the trial court did not err in denying defendant’s motion to dismiss as to this charge either.

## V. Possession and Transportation of Cocaine

[7] Defendant contends that the trial court erred in not arresting judgment on either possession or transportation of cocaine and heroin because punishing him for both violates the Double Jeopardy Clause, but concedes that there is case law directly contrary to his position. In *State v. Perry*, our Supreme Court held “that possessing, manufacturing, and transporting heroin are separate and distinct offenses” and that a defendant may be convicted and punished for both. *State v. Perry*, 316 N.C. 87, 103-04, 340 S.E.2d 450, 461 (1986). Even if we were so inclined, we are without power to overrule a decision of our Supreme Court. *Cannon v. Miller*, 313 N.C. 324, 324, 327 S.E.2d 888, 888 (1986). Therefore, defendant’s argument on this point is meritless.

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**VI. Conclusion**

In conclusion, we affirm the trial court's order denying defendant's motion to suppress the drugs seized from his person, find no prejudicial error in the trial court's denial of defendant's motion to exclude opinion testimony about the scales, find no error as to the trial court's denial of defendant's motions to dismiss, and no error in the trial court's imposition of judgment on both trafficking by possession and trafficking by transportation of heroin and cocaine.

ORDER AFFIRMED; NO ERROR.

Judges ELMORE and HUNTER, JR., Robert N. concur.

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STATE OF NORTH CAROLINA  
v.  
LAURENCE ALVIN LOVETTE, JR.

No. COA12-794

Filed 5 February 2013

**1. Robbery—armed—indictment—person from whom property taken—not named**

An indictment for armed robbery that did not name the person from whom the property was taken was sufficient to convey subject matter jurisdiction. By alleging that defendant took and carried away “another’s personal property,” this indictment negated the idea that defendant was taking his own property. Moreover, the indictment named the person whose life was endangered by the threatened use of firearms.

**2. Jury—selection—questions regarding interested witnesses—witnesses with criminal backgrounds**

There was no abuse of discretion in a prosecution for murder, kidnapping, and robbery where the trial court overruled defendant’s objections to questions asked of prospective jurors about testimony from witnesses with criminal backgrounds or about their feelings regarding felony murder. These were attempts to determine the prospective jurors’ abilities to follow the law and not reject out of hand the testimony of interested witnesses or

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those with criminal records, not hypothetical questions intended to stake out the jurors.

**3. Jury—selection—hearing impaired prospective juror**

The trial court did not abuse its discretion in a prosecution for murder, kidnapping, and robbery by denying defendant's request to excuse a prospective juror for cause based on his hearing where the court obtained a hearing device for the juror, tested the device in the courtroom, and the court gave a logical and thoughtful explanation of its ruling.

**4. Constitutional Law—effective assistance of counsel—no actual concession of guilt**

The trial court did not receive ineffective assistance of counsel through a concession of guilt where absolutely nothing in counsel's comment could be reasonably construed as suggesting that defendant would be found guilty, let alone a concession that he *should* be found guilty.

**5. Sentencing—life imprisonment for juvenile—remanded—new statute**

A sentence of life imprisonment without parole for a defendant who was 17 years old when the crime was committed was remanded for a new sentencing hearing where defendant's direct appeal was pending when N.C.G.S. § 15A-1476 was enacted to comply with a U.S. Supreme Court decision.

Appeal by Defendant from judgments entered 20 December 2011 by Judge R. Allen Baddour in Orange County Superior Court. Heard in the Court of Appeals 12 December 2012.

*Attorney General Roy Cooper, by Assistant Attorney General Amy Kunstling Irene, for the State.*

*Cheshire Parker Schneider & Bryan, PLLC, by John Keating Wiles, for Defendant.*

STEPHENS, Judge.

*Procedural History and Evidence*

This appeal arises from Defendant's conviction of participating in the March 2008 kidnapping, robbery, and murder of Eve Marie Carson, then president of the student body at the University of North Carolina at Chapel Hill ("UNC"). The evidence at trial tended to show

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the following: On 5 March 2008, Carson lived in a house at 202 Friendly Lane in Chapel Hill with three fellow UNC students. One of her roommates saw Carson when he stopped by their house about 1:30 that morning. At that time, Carson was sitting in the living room working on a class paper. No one else was in the house. Carson's car, a Toyota Highlander SUV, was parked in the driveway. When the roommate returned to the house around 4:30 a.m., Carson, her laptop computer, and her car were gone.

About 5:00 a.m., officers from the Chapel Hill Police Department ("CHPD") responded to a 911 call about gunshots and a young woman yelling in the area of Hillcrest Drive. The officers discovered a woman's body lying in the road in the area of Hillcrest Drive and Hillcrest Circle. The woman, later identified as Carson, was dead, having suffered multiple gunshot wounds. Four .25 caliber shell casings were found near the body.

On 6 March 2008, officers investigating the murder released a still image of a suspect from bank video surveillance footage from an ATM where Carson's card had been used on the morning of and the day following her death. The image, which was shown on local television newscasts, showed an African-American male in an SUV with two passengers.

On 12 March 2008, Shanita Love of Durham contacted law enforcement officers with information about the Carson case, which led to the arrest of Defendant. Defendant was subsequently indicted on charges of first-degree murder, first-degree kidnapping, felonious larceny, felonious possession of stolen goods, and robbery with a dangerous weapon.

The case came on for trial at the 28 November 2011 criminal session of superior court in Orange County. At trial, Love testified on behalf of the State. Love testified that she and her children lived in an apartment in Durham with Demario Atwater and his mother, sister, and three brothers. Defendant was a friend of Atwater's siblings and often stopped by the apartment. On 4 March 2008, Atwater left the apartment after 10:00 p.m. and returned about 5:30 the next morning. Later, when Atwater saw the still image from the bank surveillance footage on television, he called Defendant into the room and told him that his picture was on the news. Defendant replied, "Oh, s—t," asked to use the phone, and left. On 8 March 2008, Love accompanied Atwater, his brother, and Defendant as they disposed of pieces of a .25 caliber handgun. On the same day, Atwater and Defendant broke

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up a sawed-off shotgun on some bricks and put the pieces into grocery bags, which Atwater disposed of.

Defendant's acquaintance Jayson McNeil testified that Defendant called him on 4 March 2008 and asked McNeil to drive Defendant and Atwater to Chapel Hill. McNeil was busy and not able to provide the ride. Defendant called McNeil again on 12 March 2008 and asked McNeil to come and pick him up. Defendant told McNeil that he was anxious to get out of the area because Atwater was "going to tell." When McNeil testified that, when he asked Defendant what he meant, Defendant

explained to me on the night that he called my cell phone—explained to me letting me know that the night they needed a ride to Chapel Hill was the reason. And he also explained to me that when they got—him and [Atwater] had gotten the car. They no longer needed my car—a ride, and they had borrowed his mother's PT Cruiser—purple PT Cruiser and went to Chapel Hill.

And they explained to me that they seen Eve Carson get in her car, and they rushed the car—rushed towards her car. Him and [Atwater] got out his mother's car and they rushed the car. And when they rushed and got in the car, they explained to me—[Defendant] explained that he got in the driver's seat and [Atwater] had gotten in the back seat and had Eve Carson hostage with the gun to her head.

And then he also explained to me leaving—he explained to me leaving. They left there and made threats to her about the card, the ATM machine card. And he said the whole time Eve Carson was in the back seat, she was pleading for her life and explained that they didn't have to do what they was doing. And he also explained to me that they went to a store to use the card, to the way it had happened. And he also explained how it happened, how they used the card and how [Atwater] was in the back. [Atwater] was fiddling with her clothes and touching her in certain parts of her body.

And he also explained to me going to—after this, explained to me about them going to somewhere in the woods, if I'm not mistaken, and to where she was plead-

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ing with them, begging for her life, explaining that they didn't have to do what they were doing; that they could take whatever they want. They didn't have to do what they were doing.

And he explained to me—and I asked him—I said, “so what led to y'all murdering her?” And he explained to me because that she had seen their face. And then he explained to me how they—how they murdered her. He explained to me that he shot her five times with a .25 caliber. And then he explained to me that she was still alive; that she took the bullets, and she ate them without—and she was still alive. She was still moving and stuff. And he explained to me that . . . Atwater stood over top of her with a .410 gauge, and if I'm not mistaken, he told me he shot her in the chest. And when he explained shooting her in the chest, he said he no longer heard anything out of her. She was dead.

Other evidence linking Defendant to the crime included a match between Defendant's DNA profile and the DNA profile of a swabbing taken of the interior driver's side door panel of Carson's SUV and footwear impressions from receipts found in the interior of the vehicle which were consistent with Defendant's shoes.

Defendant did not present any evidence. The jury returned verdicts of guilty on all charges. The trial court sentenced Defendant to life imprisonment without the possibility of parole for the first-degree murder conviction, and consecutive terms of 100 to 129 months and 77 to 102 months for the first-degree kidnapping and robbery with a dangerous weapon convictions. The court arrested judgment on the felonious larceny and felonious possession of stolen goods convictions. Defendant gave oral notice of appeal in open court.

On 29 August 2012, Defendant filed a motion for appropriate relief (“MAR”) with this Court, seeking remand for resentencing on his first-degree murder conviction pursuant to *Miller v. Alabama*, \_\_\_ U.S. \_\_\_, 183 L. Ed. 2d 407 (2012). On 6 September 2012, the State filed a response to Defendant's MAR, conceding that, in light of *Miller* and subsequently-enacted state statutes, Defendant must be resentenced. The MAR was referred to this panel for decision.

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*Discussion*

In his direct appeal, Defendant brings forward four arguments: (1) that his robbery with a dangerous weapon indictment was fatally defective, (2) that the trial court abused its discretion in overruling Defendant's objections to certain questions asked by the State during jury selection, (3) that the trial court abused its discretion by denying three of Defendant's challenges for cause during jury selection, and (4) that Defendant received ineffective assistance from his trial counsel. We find no error in Defendant's trial. However, as discussed herein, we allow Defendant's MAR, vacate his sentence on the first-degree murder conviction, and remand to the trial court for a new sentencing hearing.

*I. Robbery with a Dangerous Weapon Indictment*

Defendant first argues that the trial court lacked subject matter jurisdiction to try him for robbery with a dangerous weapon because the indictment on that charge failed to name the person from whose presence property was taken and, as a result, was fatally defective. We disagree.

We review the question of an alleged defect in a criminal indictment *de novo*. *State v. Marshall*, 188 N.C. App. 744, 748, 656 S.E.2d 709, 712 (2008).

A valid bill of indictment is essential to the jurisdiction of the Superior Court to try an accused for a felony and have the jury determine his guilt or innocence, and to give authority to the court to render a valid judgment. . . . North Carolina law has long provided that there can be no trial, conviction, or punishment for a crime without a formal and sufficient accusation. In the absence of an accusation the court acquires no jurisdiction whatsoever, and if it assumes jurisdiction a trial and conviction are a nullity. In other words, an indictment must allege every element of an offense in order to confer subject matter jurisdiction on the court.

*Id.* at 748, 656 S.E.2d at 712-13 (citations, quotations marks, and emphasis omitted).

The elements of robbery are "1) the unlawful taking or attempt to take personal property from the person or in the presence of another; 2) by use or threatened use of a firearm or other dangerous weapon;

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[and] 3) whereby the life of a person is endangered or threatened.” *State v. Wiggins*, 334 N.C. 18, 35, 431 S.E.2d 755, 765 (1993).

[I]t is not necessary that ownership of the property be laid in a particular person in order to allege and prove . . . robbery. . . . An indictment for robbery will not fail if the description of the property is sufficient to show it to be the subject of robbery and negates the idea that the accused was taking his own property.

*State v. Jackson*, 306 N.C. 642, 654, 295 S.E.2d 383, 390 (1982) (citation and quotation marks omitted); *see also State v. Rankin*, 55 N.C. App. 478, 479-80, 286 S.E.2d 119, 119-20 (holding that a robbery indictment is sufficient so long as it alleges the victim’s life was threatened with the weapon and puts the defendant on notice of the substance of the offense), *appeal dismissed and disc. review denied*, 305 N.C. 590, 292 S.E.2d 11 (1982). Thus, “[w]hile . . . an indictment for armed robbery need not allege actual legal ownership of property, . . . the indictment must at least name a person who was in charge or in the presence of the property at the time of the robbery, if not the actual, legal owner.” *State v. Moore*, 65 N.C. App. 56, 62, 308 S.E.2d 723, 727 (1983) (citations omitted).

Here, the indictment for robbery with a dangerous weapon was a preprinted form with blanks to be filled in and alleged that Defendant

unlawfully, willfully and feloniously did steal, take, and carry away and attempt to steal, take and carry away another’s personal property, A 2005 TOYOTA HIGHLANDER AUTOMOBILE (VIN: JTEDP21A250047971) APPROXIMATE VALUE OF \$18,000.00; AND AN LP<sup>1</sup> FLIP PHONE, HAVING AN APPROXIMATE VALUE OF \$100.00; AND A BANK OF AMERICA ATM CARD, HAVING AN APPROXIMATE VALUE OF \$1.00; AND APPROXIMATELY \$700.00 IN U.S. CURRENCY of the value of \$18,801.00 dollars, from the presence, person, place of business, and residence of \_\_\_\_\_.

\_\_\_\_\_. The defendant committed this act having in possession and with the use and threatened use of firearms and other dangerous weapons, implements, and means, A SAWED OFF HAR-

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1. Although the indictment lists an “LP” flip phone, this may be a clerical error as a popular brand of cellular phone at the time of Carson’s murder was an “LG” flip phone.



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RINGTON & RICHARDSON TOPPER MODEL 158, 12 GAUGE SHOTGUN (SERIAL # L246386) AND AN EXCAM GT-27 .25 CALIBER SEMI-AUTOMATIC PISTOL (SERIAL # M11062) whereby the life of EVE MARIE CARSON was endangered and threatened.

By alleging that Defendant took and carried away “another’s personal property,” this indictment “negates the idea that [Defendant] was taking his own property.” *Jackson*, 306 N.C. at 654, 295 S.E.2d at 390 (citation omitted). The indictment also specifies that Defendant “committed this act having in possession and with the use and threatened use of firearms and other dangerous weapons, implements, and means . . . whereby the life of EVE MARIE CARSON was endangered and threatened.” Plainly, Carson’s life could not have been “endangered and threatened” unless she was the one in the presence of the property when Defendant “committed this act[.]” Thus, the indictment sufficiently names the “person who was in charge or in the presence of the property at the time of the robbery,” *Moore*, 65 N.C. App. at 62, 308 S.E.2d at 727, to give the trial court subject matter jurisdiction over the matter. Accordingly, Defendant’s argument is overruled.

*II. Questions by the State During Jury Selection*

Defendant next argues that the trial court abused its discretion in overruling his objections to certain questions asked by the State during jury selection. We disagree.

In reviewing any jury *voir dire* questions, [an appellate c]ourt examines the entire record of the *voir dire*, rather than isolated questions. It is well established that the right of counsel to inquire into the fitness of prospective jurors is subject to close supervision by the trial court. The regulation of the manner and the extent of the inquiry rests largely in the discretion of the trial court. The exercise of such discretion constitutes reversible error only upon a showing by the defendant of harmful prejudice and clear abuse of discretion by the trial court.

*State v. Jones*, 347 N.C. 193, 203, 491 S.E.2d 641, 647 (1997) (citations omitted).<sup>2</sup>

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2. Unlike Defendant here, the defendant in *Jones* did not object at trial to the questions later challenged on appeal. *Id.* at 202, 491 S.E.2d at 647.

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In *Jones*, our Supreme Court summarized the bounds of permissible jury *voir dire* questions:

On the *voir dire* . . . of prospective jurors, hypothetical questions so phrased as to be ambiguous and confusing or containing incorrect or inadequate statements of the law are improper and should not be allowed. Counsel may not pose hypothetical questions designed to elicit in advance what the juror's decision will be under a certain state of the evidence or upon a given state of facts. In the first place, such questions are confusing to the average juror who at that stage of the trial has heard no evidence and has not been instructed on the applicable law. More importantly, such questions tend to "stake out" the juror and cause him to pledge himself to a future course of action. This the law neither contemplates nor permits. The court should not permit counsel to question prospective jurors as to the kind of verdict they would render, or how they would be inclined to vote, under a given state of facts.

Hypothetical questions that seek to indoctrinate jurors regarding potential issues before the evidence has been introduced and before jurors have been instructed on applicable principles of law are similarly impermissible. These prohibitions are founded in the constitutional right of a criminal defendant to trial by an impartial jury. However, the right to an impartial jury contemplates that each side will be allowed to make inquiry into the ability of prospective jurors to follow the law. Questions designed to measure a prospective juror's ability to follow the law are proper within the context of jury selection *voir dire*.

*Id.* at 202-03, 491 S.E.2d at 647 (citations omitted). In *Jones*, the State had asked prospective jurors about their ability to consider the testimony of witnesses who had received plea deals in exchange for their cooperation: " 'After having listened to that testimony and the court's instructions as to what the law is, and you found that testimony believable, could you give it the same weight as you would any other uninterested witness? Anyone that could not do that?' " *Id.* at 202, 491 S.E.2d at 646. The Court held that these questions were not attempts to "stake out" jurors, but rather "merely inquired into the ability of prospective jurors first to consider the testimony of an interested wit-

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ness and the instructions of the trial court relative thereto, and then to give it the same weight as the testimony of any other witness if they found the testimony credible.” *Id.* at 204, 491 S.E.2d at 648. As a result, the Court found no abuse of discretion. *Id.*

Here, Defendant objected to the State’s questions about whether jurors could “consider” testimony by witnesses who had criminal records, had received immunity deals for their testimony, and/or were uncharged participants in some of the criminal activities described at trial.<sup>3</sup> Defendant also objected to questions about the jurors’ understanding of and feelings about the substantive law on felony murder. As in *Jones*, these were not “hypothetical questions designed to elicit in advance what the juror’s decision will be under a certain state of the evidence or upon a given state of facts[,]” but instead were attempts to determine the “prospective jurors’ abilities to follow the law” and not reject out of hand the testimony of interested witnesses or those with criminal records.<sup>4</sup> *Id.* at 202-03, 491 S.E.2d at 647. We see no abuse of discretion by the trial court in overruling Defendant’s objections to these questions. Accordingly, this argument is overruled.

### III. Defendant’s Challenges for Cause During Jury Selection

Defendant also argues that the trial court abused its discretion by denying three of Defendant’s challenges for cause during jury selection. We disagree.

[Section] 15A-1214(h) [of our General Statutes] prescribes the only method of preserving for appellate review a denial of a challenge for cause. Counsel must first have exhausted his peremptory challenges, must have renewed for cause as to each prospective juror whose previous challenge for cause had been denied, and must have had his renewed motion denied as to the juror in question.

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3. Questions by the State to which Defendant objected included: “Can you consider the testimony of witnesses with criminal records in order to reach a verdict?” and “Can you consider testimony of witnesses who were in essence accessories after the fact in order to reach a verdict?”

4. Our case law is clear that if, after taking into account a witness’s interest in a case, a juror believes the witness to be credible, she should treat the interested witness’s testimony in the same manner as any other believable evidence. *State v. Larrimore*, 340 N.C. 119, 167, 456 S.E.2d 789, 815 (1995).

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*State v. Roseboro*, 351 N.C. 536, 544, 528 S.E.2d 1, 7, *cert. denied*, 531 U.S. 1019, 148 L. Ed. 2d 498 (2000). These provisions are mandatory, and a request for additional peremptory challenges is no substitute for following the statutory procedures. *Id.* at 545, 528 S.E.2d at 7.

Here, Defendant challenged prospective jurors 2 and 5. The trial court overruled his challenges to both jurors, and Defendant then excused each juror using peremptory challenges. Defendant then challenged prospective juror 12 for cause, which the trial court also overruled. At that point, because he had already exhausted his allotted peremptory challenges, Defendant asked for an additional peremptory challenge. The court denied this request, and defense counsel responded, "Then we can't do anything except accept him." However, Defendant never renewed his challenges for cause as to prospective jurors 2 or 5. Accordingly, he has not preserved for appellate review his arguments as to his challenges of those jurors.

Where properly preserved for appellate review, "the trial court's ruling on a challenge for cause will not be overturned absent abuse of discretion." *State v. Quick*, 329 N.C. 1, 17, 405 S.E.2d 179, 189 (1991). "A trial court may be reversed for an abuse of discretion only upon a showing that its ruling was so arbitrary that it could not have been the result of a reasoned decision." *State v. Wilson*, 313 N.C. 516, 538, 330 S.E.2d 450, 465 (1985).

One ground for a challenge for cause is that a prospective juror "[i]s incapable by reason of . . . physical infirmity of rendering jury service." N.C. Gen. Stat. § 15A-1212(2) (2011). Our Supreme Court has observed that "the better practice [is] for our trial judges freely to excuse any juror who has a genuine hearing impairment which in the juror's opinion would hamper his or her ability to perform a juror's duties[.]" *State v. King*, 311 N.C. 603, 615, 320 S.E.2d 1, 9 (1984). However, the Court found no abuse of discretion in the trial court's failure to excuse a prospective juror in *King*, even though the prospective juror said twice he should not hear the case because of his poor hearing and reported during *voir dire* that " 'sometimes I meet people that to me sounds [sic] like they are mumbling and I don't understand too well.' " *Id.*

Here, the basis for Defendant's challenge for cause to prospective juror 12 was that the juror "had problems hearing[.]" The juror admitted that his age caused him to sometimes have difficulty hearing voices over background noise. The trial court then obtained a listening device for the prospective juror's use. During *voir dire*, both the

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prosecutor and defense counsel made a point of asking questions while facing away from the prospective juror to ascertain whether he could hear without reading lips. In ruling on Defendant's challenge for cause, the court explained:

All right. It did not appear to the Court that he had any trouble. I think he didn't hear one word that [defense counsel] used, and it was slightly muddled, frankly, in her speaking it, not in the direction she spoke it. And I think that is as likely to happen to any juror as it is to [prospective juror 12]. In other words, I think he can hear and understand the proceedings with the assistance of the listening device, and I did not observe him having any abnormal amount of difficulty in doing so. So that motion is denied.

This response does not remotely suggest a ruling "so arbitrary that it could not have been the result of a reasoned decision[.]" *Wilson*, 313 N.C. at 538, 330 S.E.2d at 465 (citation omitted), but rather, a logical and thoughtful decision by the trial court. Thus, as in *King*, Defendant has failed to show an abuse of discretion. Accordingly, this argument is overruled.

*IV. Ineffective Assistance of Counsel*

Finally, Defendant argues that he received ineffective assistance from his trial counsel. Specifically, Defendant contends that his trial counsel conceded his guilt to the jury without his consent. We disagree.

When counsel admits his client's guilt without first obtaining the client's consent, the client's rights to a fair trial and to put the State to the burden of proof are completely swept away. The practical effect is the same as if counsel had entered a plea of guilty without the client's consent. Counsel in such situations denies the client's right to have the issue of guilt or innocence decided by a jury.

For the foregoing reasons, we conclude that ineffective assistance of counsel, per se in violation of the Sixth Amendment, has been established in every criminal case in which the defendant's counsel admits the defendant's guilt to the jury without the defendant's consent.

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*State v. Harbison*, 315 N.C. 175, 180, 337 S.E.2d 504, 507-08 (1985) (citation omitted), *cert. denied*, 476 U.S. 1123, 90 L. Ed. 2d 672 (1986).

Here, during her initial closing argument, one of Defendant's trial attorneys gave the jury a summary of the final proceedings of the guilt-innocence phase of Defendant's trial:

Good morning. We're just about completed the book that I was telling you about in my opening statement. You will write the final chapter which is the conclusion of state's evidence against Laurence Lovette. At the conclusion of our arguments, which are not evidence as the judge tells you, but are looking at the evidence in trying to assist you in reaching a verdict. Verdict is Latin for speaking the truth.

The judge will give you what is called final jury instructions. And he will tell you about the—what you should find as far as the law is applied to whatever you find the facts are in the case, based upon your decisions.

There will be a verdict sheet on first degree murder, a verdict sheet on robbery with a firearm, kidnapping, and stolen goods—felonious stolen goods, possession. And those are the charges that Mr. Lovette has been charged with. That's what you've been here sitting in court to try to figure out whether or not he's guilty or not guilty based on the state's evidence in this case.

You will remember that I talked to you about certain promises that you made on *voir dire*, to listen to the law and certain concepts such as presumption of innocence. We're about finished with that when you reach a verdict.

And reasonable doubt and credibility of witnesses. The judge will give you the instructions on exactly what that means. And listen very carefully to him, and that will assist you in trying to figure out and filter through all the evidence that the state has presented.

The state has the burden of proof of showing all the elements in each and every offense has been proven sufficiently with credible evidence beyond a reasonable doubt.

The elements are like ingredients to a cake or something you want to bake. If you don't have the correct

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ingredients, it will not come out. If the state has not met its burden of proof in reaching all the elements beyond a reasonable doubt, it is your duty to return a verdict of not guilty. That's our how our system works.

The judge will tell you what the law is, and you will talk and deliberate among yourselves and come back with a unanimous verdict that you all agree on. That means each and every one of you has a vote, and each and every one of you is important.

I'm going to sit down now, but I will be back—I know you're waiting—to give a closing argument. In the meantime, the state will give its closing arguments, and then [Defendant's other trial counsel] will come back, and then I will come back on behalf of Mr. Lovette.

I want to thank you again for your attention and your patience and, obviously, your interest in trying to do what you should do as jurors and keep an open mind in this case. Thank you very much.

Defendant draws our attention to the remark “You will remember that I talked to you about certain promises that you made on *voir dire*, to listen to the law and certain concepts such as the presumption of innocence. We're about finished with that when you reach a verdict.” Defendant contends his counsel “implicitly conceded that the jury would finish with the concept of [Defendant's] presumption of innocence and find him guilty[.]” Even taken out of context and considered in isolation, we are not persuaded that this remark even approaches a concession of guilt. Read in the context of her entire initial closing statement, much less in the context of all three of the defense's closing statements, not even the most tortured reading of defense counsel's comment could lead to the interpretation suggested by Defendant. Rather, it is plain that defense counsel was merely remarking in passing that the end of the trial was growing near and that the jury would soon be past a focus on legal concepts. Absolutely nothing in the comment can be reasonably construed as suggesting that Defendant would be found guilty, let alone a concession that he *should* be found guilty. This argument utterly lacks merit, and accordingly, it is overruled.

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## V. Defendant's MAR

In his MAR, Defendant seeks a new sentencing hearing, citing *Miller*. In *Miller*, which was decided after Defendant was sentenced, the United States Supreme Court held that imposition of a *mandatory* sentence of life without the possibility of parole for a defendant who was under the age of eighteen when he committed his crime violates the Eighth Amendment's prohibition on cruel and unusual punishment. *Id.* at \_\_\_, 183 L. Ed. 2d at 414-15. After noting scientific studies that reveal differences in brain function and other psychological and emotional factors between adults and juveniles, the Court held that "a judge or jury must have the opportunity to consider mitigating circumstances before imposing the harshest possible penalty for juveniles." *Id.* at \_\_\_, \_\_\_, 183 L. Ed. 2d at 418-19, 430.

In response to the *Miller* decision, our General Assembly enacted N.C. Gen. Stat. § 15A-1476 *et seq.* ("the Act"), entitled "An act to amend the state sentencing laws to comply with the United States Supreme Court Decision in *Miller v. Alabama*." N.C. Sess. Law 2012-148.<sup>5</sup> The Act applies to defendants convicted of first-degree murder who were under the age of eighteen at the time of the offense. N.C. Gen. Stat. § 15A-1340.19A. Section 15A-1340.19B(a) provides that if the defendant was convicted of first-degree murder *solely* on the basis of the felony murder rule, his sentence shall be life imprisonment with parole.<sup>6</sup> N.C. Gen. Stat. § 15A-1340.19B(a)(1) (2012). In all other cases, the trial court is directed to hold a hearing to consider any mitigating circumstances, *inter alia*, those related to the defendant's age at the time of the offense, immaturity, and ability to benefit from rehabilitation. N.C. Gen. Stat. §§ 15A-1340.19B, 15A-1340.19C. Following such a hearing, the trial court is directed to make findings on the presence and/or absence of any such mitigating factors, and is given the discretion to sentence the defendant to life imprisonment either with or without parole. N.C. Gen. Stat. §§ 15A-1340.19B(a)(2), 15A-1340.19C(a). "[N]ew rules of criminal procedure [such as the Act] must be applied retroactively 'to all cases, state or federal, pending on direct review or not yet final.' " *State v. Zuniga*, 336 N.C. 508, 511,

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5. The Act became effective when passed on 12 July 2012. N.C. Sess. Law 2012-148, Section 3. Session Law 2012-148 designated this Act as sections 15A-1476 *et seq.*, but the Act was later redesignated and renumbered at the direction of the Revisor of Statutes and is now found at N.C. Gen. Stat. § 15A-1340.19A *et seq.*

6. Life imprisonment with parole is defined in the Act as the defendant serving "a minimum of 25 years imprisonment prior to becoming eligible for parole." N.C. Gen. Stat. § 15A-1340.19A (2012).



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444 S.E.2d 443, 445 (1994) (quoting *Griffith v. Kentucky*, 479 U.S. 314, 328, 93 L. Ed. 2d 649, 661 (1987)).

Here, as conceded by the State, the Act applies to Defendant, who was seventeen years old at the time of Eve Carson's murder and whose case was pending on direct appeal when the Act became law. In addition, Defendant's jury returned a verdict of guilty of first-degree murder on the basis of malice, premeditation, and deliberation, as well as the felony murder rule. Accordingly, we must vacate Defendant's sentence of life imprisonment without parole and remand to the trial court for resentencing as provided in the Act. Following a resentencing hearing, the trial court shall, in its discretion, determine the appropriate sentence for Defendant and make findings of fact in support thereof.

NO ERROR IN TRIAL; REMANDED FOR RESENTENCING.

Judges STEELMAN and McCULLOUGH concur.

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STATE OF NORTH CAROLINA  
v.  
ROBERT STEPHEN SMITH, DEFENDANT

No. COA12-809

Filed 5 February 2013

**1. Arrest—indecent exposure—jury instruction on resisting public officer—probable cause—apprehension required immediate arrest**

The trial court did not commit plain error by instructing the jury that an arrest for indecent exposure would be a lawful arrest for the jury charge on resisting a public officer. The officer had probable cause to believe that defendant would not be apprehended unless immediately arrested, and therefore, the arrest complied with N.C.G.S. § 15A-401(b). The fact that officers had already received defendant's license plate number and other identifying information was immaterial to this determination.

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**2. Police Officers—resisting public officer—probable cause—fleeing scene of crime—indecent exposure—willfulness**

The trial court did not err by denying defendant's motion to dismiss the charge of resisting a public officer based on alleged insufficient evidence that defendant's arrest was lawful and that defendant willfully resisted. Because the officer had probable cause to believe that defendant was fleeing the scene of the crime and the officers had probable cause to believe that he had committed indecent exposure, his warrantless arrest was lawful. A reasonable juror could conclude that defendant's subsequent attempts to pull his pants up did not constitute justification for refusing to obey the officer's commands to submit peaceably to the arrest.

**3. Evidence—officer testimony—defendant a convicted sex offender—no abuse of discretion**

The trial court did not abuse its discretion in a resisting a public officer case by denying defendant's motion for a mistrial after an officer mentioned that defendant was a convicted sex offender in another county. Even assuming that defendant did not open the door to this testimony, the trial court promptly sustained defendant's objection, granted his motion to strike, and issued a curative instruction that properly addressed the inadmissible evidence without repeating it.

Appeal by defendant from judgments entered on or about 16 February 2012 by Judge H. William Constangy in Superior Court, Gaston County. Heard in the Court of Appeals 10 December 2012.

*Attorney General Roy A. Cooper, III by Assistant Attorney General Donald W. Laton, for the State.*

*Merritt, Webb, Wilson & Caruso, PLLC by Andrew L. Farris, for defendant-appellant.*

STROUD, Judge.

Robert Stephen Smith ("defendant") appeals from his convictions for resisting, delaying, or obstructing a public officer and indecent exposure. For the following reasons, we find no error in his trial.

**I. Background**

On 13 August 2010, defendant was charged by magistrate's order with resisting, delaying or obstructing a public officer and indecent

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exposure. Defendant pleaded no contest in district court, then appealed for trial *de novo* in Gaston County Superior Court.

The State's evidence at trial tended to show that on 13 August 2010, defendant was sitting in his car in the parking lot of a shopping center in Gaston County which contained Roses and Bouquets Florist and several other stores. Ms. Patricia Crumbley, who worked at Roses and Bouquets, observed defendant masturbating in his car and called the police. Mr. Kyle Clark, who worked in the same shopping center, was informed that someone had been seen masturbating in the parking lot and went to take a look and to record the perpetrator's license plate number. Mr. Clark testified that he observed defendant rubbing himself but that his pants were up at the time.

A few minutes later, as Sgt. Clark (Mr. Clark's father) and Officer Sherrill of the Gastonia Police Department pulled into the parking lot, defendant's car pulled away and left. After getting the vehicle description and license plate information, the police alerted other units in the area to be on the lookout for defendant's car. As he was pulling into the parking lot, Officer Sherrill noticed that a car driven by defendant fit the description and information given, turned around, and pulled it over. When Officer Sherrill approached defendant's car he saw that defendant had his shorts down, with the waistband around his thighs and his genitals exposed. The officer demanded that defendant show his hands several times before defendant complied. Officer Sherrill then opened defendant's driver side door, had him step out, informed him that he was being arrested, and asked defendant to put his hands behind his back. Rather than complying, defendant tried "to turn in a circle" and began defecating on the ground. Officer Sherrill ordered defendant to give him his right arm five or six times and threatened to use force before defendant finally complied. Once in handcuffs, defendant did not attempt to resist.

The jury returned verdicts of guilty as to both charges. On 16 February 2012, the trial court entered judgment and sentenced defendant to 60 days in jail for indecent exposure and a consecutive sentence of 60 days suspended upon 24 months of supervised probation for resisting a public officer. Defendant filed timely written notice of appeal on 20 February 2012.

## II. Instruction on the Lawfulness of Arrest

[1] Defendant first argues on appeal that the trial court erred by instructing the jury that an arrest for indecent exposure would be a lawful arrest in the jury charge on resisting a public officer. Defense

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counsel did not object to the contested instruction either during the charge conference or after the instructions had been given.

At trial, defendant did not allege any defect in his arrest for public indecency. On appeal, defendant argues that the judge erred by instructing the jury that “an arrest for indecent exposure would be a lawful arrest” when his arrest was unlawful because a misdemeanor arrest is only lawful under N.C. Gen. Stat. § 15A-401 (2009) if there is an emergency situation, the offense is committed in the presence of the officer, or if it is one of the enumerated offenses in N.C. Gen. Stat. § 15A-401(b)(2).

Jury instructions not challenged at trial are normally reviewed for plain error. *See State v. Goforth*, 170 N.C. App. 584, 587, 614 S.E.2d 313, 315 (2005). Nevertheless, a “trial court’s omission of elements of a crime in its recitation of jury instructions is” treated as an unwaivable violation of the right to a unanimous jury found in Article I, Section 24 of the North Carolina Constitution, and, therefore, is “reviewed under the harmless error test.” *State v. Bunch*, 363 N.C. 841, 845, 689 S.E.2d 866, 869 (2010); *see State v. Wilson*, 363 N.C. 478, 486-87, 681 S.E.2d 325, 331 (2009) (holding that a challenge to a violation of the right to a unanimous jury where the trial court instructed one juror separate from the rest of the jury is deemed preserved notwithstanding a defendant’s failure to object at trial because the right is “fundamental to our system of justice,” so that such errors are reviewed for harmless error.).

Defendant contends that by instructing the jury that an arrest for indecent exposure would be a lawful arrest the trial court omitted an essential element from the jury instruction and that therefore harmless error applies. Harmless error analysis does not apply here, however, because the trial court did not omit any element from his jury charge.

The trial court instructed the jury that

The defendant has also been charged with resisting a public officer. Now, I charge you for you to find the defendant guilty of this offense, the state must prove five things beyond a reasonable doubt:

First, that the victim was a public officer. A police patrol officer is a public officer;

Second, that the defendant knew or had reasonable grounds to believe that the victim was a public officer;

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Third, that the victim was attempting to make a lawful arrest. *Arresting the defendant for indecent exposure would be a lawful arrest;*

Fourth, that the defendant resisted, delayed, or obstructed the victim in attempting to make a lawful arrest.

And fifth, that the defendant acted willfully and unlawfully, that is, intentionally and without justification or excuse.

So I charge you that if you find from the evidence beyond a reasonable doubt that on or about the alleged date the victim was a public officer, that the defendant knew or had reasonable grounds to believe that the victim was a public officer, that the victim was attempting to make a lawful arrest, and that the defendant willfully and unlawfully resisted, delayed, or obstructed the victim in attempting to make a lawful arrest, it would be your duty to return a verdict of guilty. However, if you do not so find or have a reasonable doubt as to one or more of these things, it would be your duty to return a verdict of not guilty.

The trial court thus instructed the jury on all five elements of resisting a public officer under N.C. Gen. Stat. § 14-223. *See State v. Dammons*, 159 N.C. App. 284, 294, 583 S.E.2d 606, 612 (2003). The error alleged by defendant is an error in the contents of an instruction concerning an element, not the omission of an element as addressed in *Bunch*. Therefore, we review the alleged error for plain error.

Under the plain error standard, defendant must show that the instructions were erroneous and that absent the erroneous instructions, a jury probably would have returned a different verdict. The error in the instructions must be so fundamental that it denied the defendant a fair trial and quite probably tilted the scales against him. It is the rare case in which an improper instruction will justify reversal of a criminal conviction when no objection has been made in the trial court. In deciding whether a defect in the jury instruction constitutes “plain error,” the appellate court must examine the entire record and determine if the instructional error had a probable impact on the jury’s finding of guilt.

*Goforth*, 170 N.C. App. at 587, 614 S.E.2d at 315 (citations and quotation marks omitted).

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Defendant was charged with resisting a public officer under N.C. Gen. Stat. § 14-223, which states: “If any person shall willfully and unlawfully resist, delay or obstruct a public officer in discharging or attempting to discharge a duty of his office, he shall be guilty of a Class 2 misdemeanor.” N.C. Gen. Stat. § 14-223 (2009). “The offense of resisting arrest, both at common law and under the statute, G.S. 14—223, presupposes a lawful arrest.” *State v. Jefferies*, 17 N.C. App. 195, 198, 193 S.E.2d 388, 391 (1972) (citation omitted), *disc. rev. denied*, 282 N.C. 673, 194 S.E.2d 153 (1973).

It is well established that the State must prove that the arrest underlying a charge for resisting arrest was lawful beyond a reasonable doubt. In *State v. Jeffries*, we observed that it was error for the trial court to fail to have the jury decide the question of whether the officer had reasonable grounds to believe that the defendant had committed a misdemeanor offense in his presence. 17 N.C. App. at 199, 193 S.E.2d at 392. In *State v. Fenner*, our Supreme Court noted that

[i]t was incumbent upon the State to satisfy the jury from the evidence beyond a reasonable doubt that defendant violated [the relevant misdemeanor statute] in the presence of the officer, or that the officer had reasonable grounds to believe the defendant had done so, in order to establish the authority and duty of the officer to make the arrest without a warrant.

*State v. Fenner*, 263 N.C. 694, 701, 140 S.E.2d 349, 354 (1965) (citation omitted). “[T]he reasonableness of the officer’s grounds to believe the defendant had committed a misdemeanor in the officer’s presence, *when properly raised*, is a factual question to be decided by the jury.” *Jefferies*, 17 N.C. App. at 199, 193 S.E.2d at 392 (emphasis added).

It is not error for the trial court to not instruct the jury on the question of the lawfulness of the arrest if the evidence does not support such an instruction. *See State v. Honeycutt*, 237 N.C. 595, 598, 75 S.E.2d 525, 527 (1953) (finding no prejudicial error in a trial court’s instruction concerning resisting arrest that lacked an instruction on the legality of the arrest where “[a]n examination of the record discloses as we have seen that the validity of the warrant was never challenged during the course of the trial. . . [and] [n]owhere in the defendant’s evidence, or in the cross-examination of the State’s witnesses, is there any intimation that the warrant was invalid.”); *Jefferies*, 17 N.C. App. at 198, 193 S.E.2d at 391 (“In [an unlawful arrest] the person attempting the arrest stands in the position of a

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wrongdoer and may be resisted by the use of force, *as in self-defense*.” (emphasis added)); *State v. Lewis*, 27 N.C. App. 426, 433, 219 S.E.2d 554, 559 (1975) (“The trial court is required to charge on self-defense, even without a special request, when, but only when, there is some construction of the evidence from which could be drawn a reasonable inference that the defendant assaulted the victim in self-defense.”) (citation omitted), *disc. rev. denied*, 289 N.C. 141, 220 S.E.2d 799 (1976).<sup>1</sup>

Here, the defendant never claimed at trial that he was acting in response to an unlawful arrest, nor did the evidence support a reasonable inference that he did so. Defendant concedes that Officer Sherrill had probable cause to arrest him for indecent exposure. Defendant only contends that his warrantless arrest was unlawful because the misdemeanor offense was not committed in Officer Sherrill’s presence and because the other statutory justifications set out in N.C. Gen. Stat. § 15A-401(b) did not exist.

We have previously held that where a “defendant was in an automobile traveling away from the scene of the crime, . . . officers were warranted in the belief that defendant would not be apprehended unless immediately arrested. Thus, in arresting the defendant without a warrant for a misdemeanor offense not committed in their presence, the arresting officers complied with N.C. Gen. Stat. § 15A-401(b)[.]” *State v. Tilley*, 44 N.C. App. 313, 317, 260 S.E.2d 794, 797 (1979).

Here, the evidence showed the same factual circumstances. At the time of defendant’s arrest he was leaving the scene of the crime in his car. Officer Sherrill saw Mr. Clark pointing to the blue truck, which matched the description being given out over the radio, pulling out of the parking lot. Officer Sherrill had probable cause to believe “that defendant would not be apprehended unless immediately arrested” and therefore the arrest complied with N.C. Gen. Stat. § 15A-401(b). *Id.* The fact that the officers had already received defendant’s license plate number and other identifying information is immaterial to this determination. Therefore, we hold that under the facts of this case, it was not error for the trial court to instruct the jury that “an arrest for indecent exposure would be a lawful arrest”.

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1. We note that the trial judge here correctly left the question of whether Officer Sherrill was, in fact, effectuating a lawful arrest when defendant allegedly resisted for the jury’s determination.

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## III. Sufficiency of the Evidence of Resisting a Public Officer

[2] Defendant next argues that the State failed to present sufficient evidence that his arrest was lawful and that defendant willfully resisted to sustain a charge of resisting a public officer. We disagree.

The standard of review for a motion to dismiss is well known. A defendant's motion to dismiss should be denied if there is substantial evidence of: (1) each essential element of the offense charged, and (2) of defendant's being the perpetrator of the charged offense. Substantial evidence is relevant evidence that a reasonable mind might accept as adequate to support a conclusion. The Court must consider the evidence in the light most favorable to the State and the State is entitled to every reasonable inference to be drawn from that evidence. Contradictions and discrepancies do not warrant dismissal of the case but are for the jury to resolve.

*State v. Teague*, \_\_\_ N.C. App. \_\_\_, \_\_\_, 715 S.E.2d 919, 923 (2011) (citation and quotation marks omitted), *disc. rev. denied*, \_\_\_ N.C. \_\_\_, 720 S.E.2d 684 (2012).

As stated above, because Officer Sherrill had probable cause to believe that defendant was fleeing the scene of the crime and, as defendant concedes, the officers had probable cause to believe that he had committed indecent exposure, his warrantless arrest was lawful. *See Tilley*, 44 N.C. App. at 317, 260 S.E.2d at 797. Therefore, there was substantial evidence that defendant was being subjected to a lawful arrest at the relevant time.

Defendant also claims that there was insufficient evidence that his resistance was willful because he was merely trying to pull his pants up when Officer Sherrill asked him to step out of the car. "Willful means more than intentional. It means without just cause, excuse, or justification." *State v. Fowler*, 22 N.C. App. 144, 147, 205 S.E.2d 749, 751 (1974). Defendant argues that the only reasonable conclusion from the evidence is that defendant was justified in resisting arrest because he was merely trying to pull up his pants.

In reviewing a motion to dismiss, we "consider the evidence in the light most favorable to the State and the State is entitled to every reasonable inference to be drawn from that evidence." *Teague*, \_\_\_ N.C. App. at \_\_\_, 715 S.E.2d at 923. According to his testimony, when Officer Sherrill approached defendant's car, he noticed that defend-



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ant's shorts were around his thighs and that his genitals were exposed. Officer Sherrill described his subsequent interaction with defendant:

Once Mr. Smith stood, he exited his vehicle, his shorts fell to the ground. . . . I then turned Mr. Smith around to detain him while we were still investigating. . . . I grabbed his arm, and he refused to give me his right arm. I had a hold of his left arm. . . . I had given him commands to put his arm behind his back, and at that point I had to almost get physical with him. At that time another officer arrived, and he grabbed his right arm, I had a hold of his left arm. We placed him in handcuffs. . . . [Before successfully placing him in handcuffs,] [h]e did continue to resist by not giving me the hands.

"When a person has been lawfully arrested by a lawful officer and understands that he is under arrest, it is his duty to submit peaceably to the arrest." *State v. Cooper*, 4 N.C. App. 210, 214, 166 S.E.2d 509, 513 (1969). Although his shorts were around his ankles when Officer Sherrill was attempting to arrest him, that fact was no fault of the officer, as defendant had been driving on public streets with his shorts unbuttoned and lowered to around his thighs. Although Officer Sherrill observed defendant twisting his shorts around when he approached defendant's vehicle, defendant did not take that opportunity to pull his shorts up. Given that defendant consistently delayed in following Officer Sherrill's instructions, a reasonable juror could conclude that defendant's subsequent attempts to pull his pants up did not constitute justification for refusing to obey Officer Sherrill's commands to "submit peaceably to the arrest." *Cooper*, 4 N.C. App. at 214, 166 S.E.2d at 513. Therefore, we hold that the trial court did not err in denying defendant's motion to dismiss.

## IV. Denial of Defendant's Mistrial Motion

[3] Defendant next contends that the trial court erred in denying his motion for a mistrial after Sgt. Clark mentioned that defendant was a convicted sex offender in Mecklenburg County.

Generally a motion for mistrial is a matter addressed to the sound discretion of the judge, and absent a showing of abuse of discretion the ruling will not be disturbed on appeal. . . . A mistrial is a drastic remedy, warranted only for *such serious improprieties as would make it impossible to attain a fair and impartial verdict*.

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*State v. Hester*, \_\_\_ N.C. App. \_\_\_, \_\_\_, 715 S.E.2d 905, 906-07 (2011) (citations, quotation marks, and brackets omitted) (emphasis in original).

The general rule is that in a prosecution for a particular crime, the State cannot offer evidence tending to show that the accused has committed another distinct, independent, or separate offense. . . . In appraising the effect of incompetent evidence once admitted and afterwards withdrawn, the Court will look to the nature of the evidence and its probable influence upon the minds of the jury in reaching a verdict. In some instances because of the serious character and gravity of the incompetent evidence and the obvious difficulty in erasing it from the mind, the Court has held to the opinion that a subsequent withdrawal did not cure the error. But in other cases the trial courts have freely exercised the privilege, which is not only a matter of custom but almost a matter of necessity in the supervision of a lengthy trial. Ordinarily where the evidence is withdrawn no error is committed. This is also the rule when unresponsive answers of a witness include incompetent prejudicial statements and the court on motion or *Ex mero motu* instructs the jury they are not to consider such testimony. Whether the prejudicial effect of such incompetent statements should be deemed cured by such instructions depends upon the nature of the evidence and the circumstances of the particular case.

*State v. Aycoth*, 270 N.C. 270, 272-73, 154 S.E.2d 59, 60-61 (1967).

Here, defense counsel asked Sgt. Clark on cross-examination, “when you were on the scene with Mr. Smith, did he ever say he had any kind of medical problems that you heard or explain to you why he was—“ Sgt. Clark responded,

He said several things. He said that he wanted to know what was going on. He said that he had asked a girl out on a date. At some point he said that he had Crone’s [sic] disease and he was trying to adjust his pants, and he also told me that he was a convicted sex offender in Mecklenburg.

Defense counsel immediately objected, moved to strike, and moved for a mistrial. The trial court opined that defense counsel may

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have opened the door to the testimony about defendant's prior offense by asking what defendant said and not moving *in limine* to exclude that portion of defendant's statement to Sgt. Clark. Nevertheless, the trial court sustained defendant's objection, granted defendant's motion to strike and delivered the following curative instruction:

Ladies and gentlemen, I have, as you heard, sustained the objection, granted a motion to strike in regard to Officer Clark's last statement in response to a question to him. Since I have granted the motion to strike, that means that that statement is stricken from the record, and I am instructing you to totally disregard and not consider that statement in your deliberations in this case.

Sgt. Clark did not mention defendant's prior conviction on direct examination and never mentioned it again on cross examination.

Ordinarily, inadmissible testimony by a witness "may be cured by [proper instruction] by the trial court, since the presumption is that jurors will understand and comply with the instructions of the court." *State v. Britt*, 288 N.C. 699, 713, 220 S.E.2d 283, 292 (1975) (citations omitted). Defendant contends that evidence that he was previously convicted of a sex offense is so highly prejudicial "that no curative instruction will suffice to remove the adverse impression from the minds of the jurors." *Id.* We disagree.

Defendant cites *State v. Austin* and *State v. Britt* to support his contention. In *Austin*, the trial court had erroneously admitted an unauthenticated hotel registration card over defendant's objection during a trial for incest. *State v. Austin*, 285 N.C. 364, 367, 204 S.E.2d 675, 677 (1974). Our Supreme Court held that the trial court had committed prejudicial error because of the powerfully corroborative nature of the evidence and the fact that the card was the "only evidence other than his daughter's testimony which bore directly upon the question whether defendant had incestuous relations with her." *Id.* The Court observed that "[a]ny attempt by the judge to restrict this evidence would have been futile, for no limiting instruction could have overcome its devastatingly prejudicial effect upon defendant's case." *Id.*

In *Britt*, the prosecutor mentioned on cross-examination of the defendant that he had been previously convicted and sentenced to death in the same case. *Britt*, 288 N.C. at 707-08, 220 S.E.2d at 288-89. The trial judge in *Britt* issued a curative instruction which included that "defendant previously had been convicted of first degree murder

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and sentenced to death but his conviction had been reversed by the Supreme Court of North Carolina so that the present trial was entirely new.” *Id.* at 708, 220 S.E.2d at 289. The Court held “that no instruction by the trial court could have removed from the minds of the jurors the prejudicial effect that flowed from knowledge of the fact that defendant had been on death row as a result of his prior conviction of first degree murder in this very case.” *Id.* at 713, 220 S.E.2d at 292.

The link between the inadmissible evidence and the charged crime was clear and unmistakable in both of the cases upon which defendant relies. Here, the vague statement that defendant is a convicted sex offender in no way corroborates any of the State’s other evidence. Although defendant argues that it might make the State’s witnesses seem more credible, the connection between the incompetent evidence and the crime at issue here is much weaker than it was in *Austin*. Further, a prosecutor’s statement, as in *Britt*, that a defendant had previously been convicted of the same crime and sentenced to death for that crime is not comparable to a single, vague mention of a prior sex crime conviction, especially where the statement came in response to a question by defense counsel on cross-examination.

We hold that the trial court did not abuse its discretion in denying defendant’s motion for mistrial. The trial court promptly sustained defendant’s objection, granted his motion to strike, and issued a curative instruction that properly addressed the inadmissible evidence without repeating it. This case is not one where “no instruction by the court could have removed from the minds of the jurors the prejudicial effect” of the evidence. *Id.* Rather, the error could be cured by prompt and adequate action by the trial court, “since the presumption is that jurors will understand and comply with the instructions of the court.” *Id.* Because the trial court took such action, we hold that, even assuming that defendant did not open the door to the admission of the contested evidence, the trial court did not abuse its discretion in denying defendant’s motion for a mistrial.

**V. Conclusion**

In summary, we find no error in the trial court’s instructions to the jury, denial of defendant’s motion to dismiss, and denial of defendant’s motion for a mistrial.

NO ERROR.

Chief Judge MARTIN and Judge ERVIN concur.

**STATE v. STOKES**

[225 N.C. App. 483 (2013)]

STATE OF NORTH CAROLINA

v.

GEORGE VICTOR STOKES

No. COA12-810

Filed 5 February 2013

**1. Assault—deadly weapon with intent to kill—motion to dismiss—sufficiency of evidence**

The trial court did not err by denying defendant's motion to dismiss the charge of assault with a deadly weapon with intent to kill. When viewed in the light most favorable to the State, the evidence was sufficient to prove that defendant acted with the intent to kill when he fired a gun right beside the victim's head.

**2. Kidnapping—second-degree—motion to dismiss—sufficiency of evidence**

The trial court erred by denying defendant's motion to dismiss the charge of second-degree kidnapping. The State failed to offer sufficient evidence to prove removal. Further, neither party contended that the victim was ever confined or restrained. The case was remanded for a new sentencing hearing.

**3. Evidence—officer testimony—Newport cigarettes at defendant's house—relevancy—perpetrator of crime**

The trial court did not err in a possession of a firearm by a felon, second-degree kidnapping, assault with a deadly weapon with intent to kill, and robbery with a dangerous weapon case by allowing an officer to testify that he saw Newport cigarettes at defendant's house. The testimony was relevant because it tended to throw light upon whether defendant was the perpetrator of the crime.

Appeal by defendant from judgment entered 9 March 2012 by Judge Richard T. Brown in Hoke County Superior Court. Heard in the Court of Appeals 11 December 2012.

*Leslie C. Rawls for defendant.*

*Attorney General Roy Cooper, by Assistant Attorney General Alexandra M. Hightower, for the State.*

ELMORE, Judge.

**STATE v. STOKES**

[225 N.C. App. 483 (2013)]

George Victor Stokes (defendant) appeals from a judgment entered upon jury convictions of possession of a firearm by a felon, second-degree kidnapping, assault with a deadly weapon with intent to kill (AWDWIK), and robbery with a dangerous weapon. Defendant also pled guilty to having attained habitual felon status, and he was sentenced to two consecutive terms of 145 to 183 months imprisonment. After careful consideration, we conclude, in part, that defendant received a trial free from error, but we vacate the second-degree kidnapping conviction and remand for a new sentencing hearing.

On 21 April 2008, defendant and one other man entered a convenience store on Laurinburg Road in Hoke County. Wielding guns, they approached the clerk and demanded a pack of Newport cigarettes and money from the register. As the clerk reached under the counter to retrieve the cigarettes, defendant asked, “What you doing? What you doing under there?” and fired a shot beside the clerk’s head.

After giving the men the cigarettes and money, defendant told the clerk to walk to the back of the store, but the clerk refused. Defendant then demanded the clerk to get into a car that was parked and waiting outside the store. The clerk began walking out from behind the counter, but he stopped after about five feet and refused to get in the car. Defendant and the other man then left the store and drove away.

Defendant was later arrested and charged with second-degree kidnapping, possession of a firearm by a felon, AWDWIK, attempted first-degree murder, robbery with a dangerous weapon, and habitual felon. He was convicted of all charges, except attempted first-degree murder, and was sentenced to two consecutive terms of 145 to 183 months imprisonment. Defendant now appeals.

**A. Motion to dismiss**

Defendant first argues that the trial court erred in denying his motion to dismiss the AWDWIK and second-degree kidnapping charges, because the State’s evidence was insufficient to show 1) that he had intent to kill and 2) that he confined, restrained, or removed the clerk. We disagree with defendant with regards to intent to kill, but agree with defendant that the State failed to prove removal.

“This Court reviews the trial court’s denial of a motion to dismiss *de novo*.” *State v. Smith*, 186 N.C. App. 57, 62, 650 S.E.2d 29, 33 (2007). “ ‘Upon defendant’s motion for dismissal, the question for the Court is whether there is substantial evidence (1) of each essential

**STATE v. STOKES**

[225 N.C. App. 483 (2013)]

element of the offense charged, or of a lesser offense included therein, and (2) of defendant's being the perpetrator of such offense. If so, the motion is properly denied.' " *State v. Fritsch*, 351 N.C. 373, 378, 526 S.E.2d 451, 455 (quoting *State v. Barnes*, 334 N.C. 67, 75, 430 S.E.2d 914, 918 (1993)), *cert. denied*, 531 U.S. 890, 148 L. Ed. 2d 150 (2000). "Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *State v. Smith*, 300 N.C. 71, 78-79, 265 S.E.2d 164, 169 (1980).

i. Assault with a deadly weapon with intent to kill

[1] At issue first is whether the evidence was sufficient to prove that defendant had the intent to kill when he fired the gun. "[I]ntent to kill is a mental attitude, and ordinarily it must be proved, if proven at all, by circumstantial evidence, that is, by proving facts from which the fact sought to be proven may be reasonably inferred." *State v. Waring*, 364 N.C. 443, 501, 701 S.E.2d 615, 651 (2010) (quotations and citation omitted).

Here, the clerk testified that when he reached under the counter to grab the Newport cigarettes defendant said, "What you doing? What you doing under there?" The clerk further explained that defendant then "shot a round off right beside my head. The bullet flew by my head, hit the wall, and came on the other side and hit the cooler in front of me." According to the clerk, defendant's actions "[s]cared me to death. I thought he was going to kill me right then."

We conclude that when viewed in the light most favorable to the State, this evidence is sufficient to prove that defendant acted with the intent to kill. From the evidence, it may be reasonably inferred that defendant intended to kill the clerk when he fired a gun right beside his head.

ii. Second-degree kidnapping

[2] At issue next is whether the evidence was sufficient to prove that defendant confined, restrained, or removed the clerk. Defendant argues that since the clerk did not comply with his requests to go to the back of the store or to the car, there was insufficient evidence of removal. Defendant directs our attention to *State v. Boyd*, where we held that "where the victim was moved a short distance of several feet, and was not transported from one room to another, the victim was not 'removed' within the meaning of our kidnapping statute." \_\_\_\_ N.C. App. \_\_\_\_, 714 S.E.2d 466, 472 (2011).

Here, the clerk testified:

**STATE v. STOKES**

[225 N.C. App. 483 (2013)]

[defendant] was telling me, “Go to the back of the store. Go to the back of the store.” And I didn’t move. Then he said, “Get in the car. Get in the car.” And I started walking, but I stopped because I said if I get in that car, he’s going to kill me. So I just stayed there. I said, “I’m not getting in the car.”

The clerk further testified that he never left the area of the store near the register and that, in response to defendant’s command to “get in the car,” he walked only “[a]bout five feet” before refusing to go further.

We agree with defendant, and conclude that the State failed to offer sufficient evidence to prove removal. Further, as neither party contends that the clerk was ever confined or restrained, we reverse defendant’s second-degree kidnapping conviction and remand for a new sentencing hearing.

**B. Relevancy**

**[3]** Defendant next argues that the trial court erred in allowing an officer to testify that he saw Newport cigarettes at defendant’s house, because the evidence was not relevant. We disagree.

“[A] trial court’s rulings on relevancy technically are not discretionary and therefore are not reviewed under the abuse of discretion standard applicable to Rule 403, [but] such rulings are given great deference on appeal.” *State v. Wallace*, 104 N.C. App. 498, 502, 410 S.E.2d 226, 228 (1991) (citation omitted). “Evidence is relevant if it has any logical tendency, however slight, to prove a fact in issue in the case.” *State v. Sloan*, 316 N.C. 714, 724, 343 S.E.2d 527, 533 (1986) (citations omitted). “[E]very circumstance that is calculated to throw any light upon the supposed crime is admissible. The weight of such evidence is for the jury.” *State v. Whiteside*, 325 N.C. 389, 397, 383 S.E.2d 911, 915 (1989) (quotations and citations omitted).

Here, the clerk testified that the two men who robbed the store demanded Newport cigarettes. Later, an officer testified to finding Newport cigarettes at defendant’s house. We conclude that this testimony was relevant, as it tended to throw light upon whether defendant was the perpetrator of the crime. As such, we do not agree that the trial court erred with regards to this issue.

No error in part, vacated and remanded in part; new sentencing hearing.

Judges McGEE and HUNTER, Robert C. concur.



**STATE v. WELLS**

[225 N.C. App. 487 (2013)]

STATE OF NORTH CAROLINA

v.

RICHARD BRANDON WELLS

No. COA12-491

Filed 5 February 2013

**Search and Seizure—inevitable discovery—no evidence**

The trial court erred by denying defendant's motion to suppress evidence seized from his laptop computer. Defendant's statement regarding the location of his computer was suppressed because it resulted from a promise, hope, or reward and there was no competent evidence to support the trial court's finding that his laptop computer would have inevitably been discovered.

Appeal by defendant from judgments entered 7 September 2011 by Judge Ronald E. Spivey in Guilford County Superior Court. Heard in the Court of Appeals 27 September 2012.

*Attorney General Roy Cooper, by Assistant Attorney General Anita LeVeaux, for the State.*

*Kevin P. Bradley for defendant appellant.*

McCULLOUGH, Judge.

Richard Brandon Wells ("defendant") appeals from his convictions for Soliciting a Child by a Computer and Attempted Indecent Liberties with a Child on the grounds that the trial judge erred in denying his motion to suppress evidence obtained from his seized laptop computer. We agree.

**I. Background**

Warrants were issued for defendant's arrest on charges of Soliciting a Child by a Computer and Attempted Indecent Liberties with a Child on 11 March 2010 for communications and acts with an online profile believed by defendant to be associated with a child of less than 16 years of age. Defendant's correspondence with the online profile occurred between the dates of 4 May 2009 and 5 March 2010. In addition to the arrest warrants, a search warrant was issued authorizing the seizure of computers from defendant's house at 554 Howard Tant Road.

## STATE v. WELLS

[225 N.C. App. 487 (2013)]

The same day the warrants were issued, Guilford County detectives traveled to Raleigh to arrest defendant and execute the search warrant. Detectives arrived at defendant's house to find that defendant was not present. Furthermore, execution of the search warrant yielded no evidence.

Thereafter, the police contacted defendant's place of employment, the Raleigh Fire Department, Spring Forest Road Station, in order to locate defendant. Defendant, who was at the station, was notified that police were going to arrest him. Opting to avoid arrest at the fire station, a senior fire official drove defendant to the Raleigh police substation on Litchford Road, at which point defendant was taken into custody.

After being taken into custody, defendant was read his *Miranda* rights. Defendant initially indicated that he was unsure whether he wanted an attorney. But when the detective responded that he could not tell him anything further than what was on the arrest warrant and would have to take him back to Guilford County, defendant proceeded to waive his rights.

During questioning, detectives elicited statements from defendant by telling him that the more he helped them, the more they could help him; and that if he was cooperative, they would inform the court and the district attorney that he had been cooperative. In response, defendant answered questions, including informing detectives that he owned a Dell laptop computer that was located on his bed at the fire station. As a result of the information obtained, the police seized defendant's laptop from the fire station.

Defendant was indicted on both charges on 6 July 2010. Before the case came on for trial, defendant filed a Motion to Suppress Statements and a Motion to Suppress Evidence. On 6 May 2011, an Order was filed ruling on defendant's suppression motions. Defendant's motion regarding his statements was granted on the grounds that the statements were involuntary and resulted from a promise, hope or reward. Defendant's motion regarding the evidence retrieved from his laptop computer was denied based on a finding "[t]hat the location of the computer would have been discovered inevitably by law enforcement officials[]" and, therefore, the conclusions that "[t]he search and seizure of the defendant's computer was lawful[]" and "[t]hat the [laptop] computer was lawfully seized[.]"

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At trial, the jury found defendant guilty. Defendant was sentenced to consecutive terms of 14-17 months and 6-9 months, the latter term suspended on the condition that defendant serve 24 months of supervised probation. Defendant appeals.

II. Analysis

The sole issue on appeal is whether the trial court erred in denying defendant's motion to suppress the evidence seized from his laptop computer.

When reviewing a trial court's denial of a motion to suppress, we are "strictly limited to determining whether the trial judge's underlying findings of fact are supported by competent evidence, in which event they are conclusively binding on appeal, and whether those factual findings in turn support the judge's ultimate conclusions of law." *State v. Cooke*, 306 N.C. 132, 134, 291 S.E.2d 618, 619 (1982). "The trial court's conclusions of law, however, are fully reviewable on appeal." *State v. Hughes*, 353 N.C. 200, 208, 539 S.E.2d 625, 631 (2000).

Here, defendant specifically contends that there is no competent evidence to support the trial court's finding that his laptop computer would have inevitably been discovered. We agree.

"[T]he 'exclusionary rule[]' . . . provides that evidence derived from an unconstitutional search or seizure is generally inadmissible in a criminal prosecution of the individual subjected to the constitutional violation." *State v. McKinney*, 361 N.C. 53, 58, 637 S.E.2d 868, 872 (2006). Furthermore, "[w]hen evidence is obtained as the result of illegal police conduct, not only should that evidence be suppressed, but all evidence that is the 'fruit' of that unlawful conduct should be suppressed." *State v. Pope*, 333 N.C. 106, 113-14, 423 S.E.2d 740, 744 (1992) (citing *Wong Sun v. United States*, 371 U.S. 471, 9 L. Ed. 2d 441 (1963)).

In this case, the trial court granted defendant's motion to suppress statements elicited from defendant during police interrogation on the ground that the statements "were obtained as a result of promise, hope or reward[]" and therefore involuntary. The State does not challenge this ruling, and therefore we accept the trial court's conclusions. However, in ruling on defendant's motion to suppress evidence seized from his laptop computer, the trial court held the search and seizure to be lawful based on the finding "[t]hat the location of [defendant's] computer would have been discovered inevitably by law enforcement officials[.]"

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[225 N.C. App. 487 (2013)]

North Carolina, like the majority of jurisdictions, has adopted the inevitable discovery exception to the exclusionary rule, discussed by the United States Supreme Court in *Nix v. Williams*, 467 U.S. 431, 81 L. Ed. 2d 377 (1984). See *State v. Garner*, 331 N.C. 491, 417 S.E.2d 502 (1992) (adopting the inevitable discovery rule in North Carolina). “Under the inevitable discovery doctrine, evidence which is illegally obtained can still be admitted into evidence as an exception to the exclusionary rule when ‘the information ultimately or inevitably would have been discovered by lawful means.’” *State v. Woolridge*, 147 N.C. App. 685, 689, 557 S.E.2d 158, 160 (2001) (quoting *Nix*, 467 U.S. at 444, 81 L. Ed. 2d at 387–88), *rev’d on other grounds*, 357 N.C. 544, 592 S.E.2d 191 (2003). Inevitable discovery is to be determined on a case-by-case basis. *Garner*, 331 N.C. at 503, 417 S.E.2d at 508. “[T]he prosecution has the burden of proving that the evidence, even though obtained through an illegal search, would have been discovered anyway by independent lawful means.” *Woolridge*, 147 N.C. App. at 689, 557 S.E.2d at 161 (citing *Nix*, 467 U.S. at 444, 81 L. Ed. 2d at 387–88). The State must do so by a preponderance of the evidence. *Garner*, 331 N.C. at 503, 417 S.E.2d at 508–09 (citing *Nix*, 467 U.S. at 444 n.5, 81 L. Ed. 2d at 388 n.5).

Although it seems entirely logical that the police would search the fire station for evidence regarding defendant’s crimes and discover the location of the laptop computer, there is no evidence in the record to support this assumption. At the suppression hearing, the only argument supporting inevitable discovery was defense counsel’s statement that:

When they wouldn’t have found the computer at his house, it’s not even a remote stretch to go—they knew exactly where he was prior to this and that’s where they would have gone. It wouldn’t take a whole lot of effort to be able to make that connection and go look for the computer where he was located.

This type of conclusory statement by counsel is not the type of evidence from which “independent lawful means” have been found to support a finding of inevitable discovery.

As previously stated, although we acknowledge that it seems logical that the laptop computer would have been discovered, the State failed to provide any evidence in this case, either through testimony concerning common practices of the fire department for inventorying employee’s belongings or through testimony regarding continued

## STATE v. WELLS

[225 N.C. App. 487 (2013)]

search efforts in this case, indicating that investigating officers would have located the laptop.

Instead, the State asserts various arguments on appeal in an attempt to bolster the validity of the search and seizure of defendant's laptop computer. These arguments lack merit.

The State first contends that defendant impliedly consented to the search of his laptop computer by telling the detectives where it was located. This argument must fail, as it entirely ignores the trial court's unchallenged conclusions that defendant's statements "were obtained as a result of promise, hope or reward" and were therefore "given involuntarily."

The State next argues that defendant had no reasonable expectation of privacy in the laptop placed in a common living area in a fire station. While the State may be correct in asserting defendant had no reasonable expectation of privacy, we need not address this issue in the present case given that "those subjected to coercive police interrogations have an *automatic* protection from the use of their involuntary statements (or evidence derived from their statements) in any subsequent criminal trial." *Chavez v. Martinez*, 538 U.S. 760, 769, 155 L. Ed. 2d 984, 995 (2003) (citations omitted); *see also Wong Sun*, 371 U.S. at 488, 9 L. Ed. 2d at 456 (stating that "the more apt question in such a case is 'whether, granting establishment of the primary illegality, the evidence . . . has been come at by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint.'") (quoting *Maguire*, *Evidence of Guilt*, 221 (1959)). The critical analysis concerning inevitable discovery is not whether defendant had a reasonable expectation of privacy based on where the laptop computer was located, but instead whether the laptop computer would have been discovered by independent lawful means. For the same reason, the State's third argument, that a valid search warrant authorized the seizure of data off the laptop computer, fails because the fact that investigators applied for a search warrant to retrieve the laptop computer's contents does not eliminate the taint that led to the discovery and seizure of the laptop computer in the first instance.

The State's final argument is that discovery of the laptop computer was inevitable because the laptop computer was known to be in existence and was the focal point of the investigation. We do not doubt either of the State's assertions; however, having knowledge that the laptop computer exists is entirely different than knowing

**STATE v. WILKINS**

[225 N.C. App. 492 (2013)]

where the laptop computer may be found. At the hearing on defendant's motions to suppress, no evidence was presented to the trial court to show how or when the laptop computer would have been discovered by independent lawful means.

**III. Conclusion**

Although it is reasonable that police would inevitably discover defendant's laptop computer, competent evidence must support such a finding. Where there is no evidence supporting the trial court's finding of inevitable discovery in this case, we hold that the trial court erred in denying defendant's motion to suppress the evidence seized from his laptop computer. Accordingly, we order a new trial.

New trial.

Judges HUNTER, JR., (Robert N.), and ERVIN concur.

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STATE OF NORTH CAROLINA  
v.  
MICHAEL CHRISTOPHER WILKINS

No. COA12-869

Filed 5 February 2013

**1. Appeal and Error—appealability—challenge to indictment on its face—not raised below**

A challenge alleging that an indictment is invalid on its face may be made at any time, even if it was not contested in the trial court.

**2. Firearms and Other Weapons—possession of by felon—indictment**

An indictment charging defendant with possession of a firearm by a felon was fatally defective where it was not brought in a separate indictment. The form of the indictment is explicitly prescribed by statute; the intent of the legislature must be given effect.

## STATE v. WILKINS

[225 N.C. App. 492 (2013)]

**3. Sentencing—habitual felon—stipulation to prior felonies**

Defendant's habitual felon conviction was vacated where defendant stipulated at his sentencing hearing to the three predicate felonies alleged by the State but the issue was not presented to the jury, nor did the trial court establish a record of a guilty plea.

Appeal by defendant from judgment entered 23 March 2012 by Judge Alma L. Hinton in Halifax County Superior Court. Heard in the Court of Appeals 13 December 2012.

*Attorney General Roy Cooper, by Special Deputy Attorney General David P. Brenskelle, for the State.*

*W. Michael Spivey for defendant-appellant.*

HUNTER, JR., Robert N., Judge.

Michael Christopher Wilkins ("Defendant") appeals from judgments entered following his conviction for Possession of a Firearm by a Felon, among other offenses. Defendant argues: (1) that the indictment charging him with Possession of a Firearm by a Felon is facially defective and (2) that the trial court erred in sentencing him as an habitual felon. For the following reasons, we vacate Defendant's Possession of a Firearm by a Felon conviction, as well as his conviction for having attained habitual felon status.

**I. Procedural History**

Defendant was indicted on 19 January 2010 for one count each of (1) Robbery with a Dangerous Weapon, (2) Second Degree Kidnapping, (3) Possession of Stolen Goods, (4) Assault with a Deadly Weapon, and (5) Possession of a Firearm by a Felon. The Robbery, Kidnapping, and Possession of Stolen Goods charges were listed on one bill of indictment, while the Possession of a Firearm by a Felon and Assault with a Deadly Weapon charges were listed together on a separate indictment. Defendant was also charged with having attained habitual felon status.

Following a trial, Defendant was convicted of the Robbery, Kidnapping, and Possession of a Firearm charges. During the sentencing phase, the trial court conducted the following exchange with Defendant:

THE COURT: Mr. Wilkins, it has been brought to my attention by your attorney that when we previously dis-

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cussed your status as being a habitual felon, you elected to stand mute; is that correct?

THE DEFENDANT: That is correct.

THE COURT: And it has been brought to my attention that at this point you wish to admit those previous convictions that have been—that the State alleges make you to be a habitual felon; is that correct?

THE DEFENDANT: Guilty of these charges?

THE COURT: The convictions, the previous convictions.

THE DEFENDANT: The old charges?

THE COURT: The old charges.

THE DEFENDANT: Yes.

THE COURT: So just to be clear, you are admitting that you were convicted of attempted common law robbery on February 26 of 1996, and that offense was committed on November 1, 1995; is that correct?

THE DEFENDANT: Do plea arrangements also count as being convicted of?

THE COURT: Yes.

THE DEFENDANT: That is correct.

THE COURT: And that you were convicted on November 12 of 2002, in Superior Court of Halifax County of assault on a handicapped person, the felony of assault on a handicapped person, that assault taking place on December 23, 2001; is that correct?

THE DEFENDANT: Correct.

THE COURT: And the attempted common law robbery conviction also occurred in Superior Court in Halifax County; is that correct?

THE DEFENDANT: That is correct.

THE COURT: And that you were convicted of common law robbery on November 2, 2005 in Nash County Superior Court, that offense taking place on May 21 of 2005?

THE DEFENDANT: Correct.



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THE COURT: Any further inquiry requested by the State?

[THE STATE]: No, ma'am.

THE COURT: Thank you. You may have a seat.

The trial court then sentenced Defendant as an habitual felon to consecutive sentences of 110-141 months imprisonment. Defendant gave oral notice of appeal in open court.

## II. Jurisdiction & Standard of Review

As Defendant appeals from the final judgment of a superior court, an appeal lies of right to this Court pursuant to N.C. Gen. Stat. § 7A-27(b) (2011).

We review the sufficiency of an indictment *de novo*. *State v. Marshall*, 188 N.C. App. 744, 748, 656 S.E.2d 709, 712 (2008). Alleged statutory errors are questions of law, *State v. Hanton*, 175 N.C. App. 250, 255, 623 S.E.2d 600, 604 (2006), and as such, are reviewed *de novo*. *Staton v. Brame*, 136 N.C. App. 170, 174, 523 S.E.2d 424, 427 (1999). Under *de novo* review, this Court “considers the matter anew and freely substitutes its own judgment for that of the lower tribunal.” *State v. Williams*, 362 N.C. 628, 632–33, 669 S.E.2d 290, 294 (2008) (quotation marks and citation omitted).

## III. Analysis

### A. Indictment for Possession of a Firearm by a Felon

[1] Defendant contends that the trial court lacked jurisdiction to try, convict, and sentence him for Possession of a Firearm by a Felon because the State failed to obtain a separate indictment for that offense. Defendant argues that the indictment for Possession of a Firearm by a Felon was fatally defective under N.C. Gen. Stat. § 14-415.1(c) because the charge was included as a separate count in a single indictment also charging Defendant with Assault with a Deadly Weapon. Defendant specifically argues that the trial court lacked jurisdiction to try him for Possession of a Firearm by a Felon because the State failed to obtain a separate indictment for that charge. We agree.

Preliminarily, we note that Defendant failed to raise this issue before the trial court. Nevertheless, “where an indictment is alleged to be invalid on its face, thereby depriving the trial court of its jurisdiction, a challenge to that indictment may be made at any time, even if it was not contested in the trial court.” *State v. Wallace*, 351 N.C.

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481, 503, 528 S.E.2d 326, 341 (2000). “A valid bill of indictment is essential to the jurisdiction of the Superior Court to try an accused for a felony and have the jury determine his guilt or innocence, ‘and to give authority to the court to render a valid judgment.’” *State v. Moses*, 154 N.C. App. 332, 334, 572 S.E.2d 223, 226 (2002) (quoting *State v. Ray*, 274 N.C. 556, 562, 164 S.E.2d 457, 461 (1968)).

[2] The statute prohibiting the possession of a firearm by a felon, N.C. Gen. Stat. § 14-415.1 (2011), reads in pertinent part as follows:

(a) It shall be unlawful for any person who has been convicted of a felony to purchase, own, possess, or have in his custody, care, or control any firearm or any weapon of mass death and destruction as defined in G.S. 14-288.8(c)

. . . .

(c) The indictment charging the defendant under the terms of this section *shall be separate from any indictment charging him with other offenses related to or giving rise to a charge under this section.*

N.C. Gen. Stat. § 14-415.1(a), (c) (2011) (emphasis added).

The question presented by this appeal is whether N.C. Gen. Stat. § 14-415.1(c) requires that a Possession of a Firearm by a Felon charge be brought in a separate indictment from other related charges.

“The principle is well settled that a statute must be construed as written and where the language of the statute is clear and unambiguous, there is no room for judicial construction.” *State v. Hardy*, 67 N.C. App. 122, 125, 312 S.E.2d 699, 702 (1984). “The courts must give the statute its plain and definite meaning and are without power to interpolate or to superimpose provisions not contained therein.” *Id.*

Here, both the Assault and Possession charges arose as a result of Defendant’s use of a firearm during a robbery. As both charges refer to the same weapon, the assault charge is directly “related” to the charge of Possession of a Firearm by a Felon in this case. Accordingly, Defendant should not have been charged with both offenses in the same indictment. N.C. Gen. Stat. § 14-415.1(c) clearly and unambiguously states, “[t]he indictment charging the defendant under the terms of [N.C. Gen. Stat. § 14-415.1] shall be separate from any indictment charging him with other offenses related to or giving

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rise to a charge under [N.C. Gen. Stat. § 14-415.1].” The form of the indictment is explicitly prescribed by statute, and we must give effect to the intent of the legislature as expressed in the statute’s plain language. We therefore decline the State’s invitation to apply the mode of statutory construction discussed in *State v. House*, 295 N.C. 189, 203, 244 S.E.2d 654, 661-62 (1978) (applying a “whole statute” test to determine whether a provision is directory notwithstanding facially mandatory language).

Because N.C. Gen. Stat. § 14-415.1(c) mandates that a charge of Possession of a Firearm by a Felon be brought in a separate indictment from charges related to it, the indictment charging Defendant with possession of a firearm in this case is fatally defective, and thus invalid. We therefore vacate Defendant’s conviction for Possession of a Firearm by a Felon.<sup>1</sup>

**B. Sentencing as an Habitual Felon**

[3] Defendant next argues that the trial court erred in sentencing him as an habitual felon because the issue was not submitted to the jury, and the record does not establish that Defendant pleaded guilty to being an habitual felon. We agree.

This Court has held that “[t]he proceedings for determining whether a defendant is an habitual felon ‘shall be as if the issue of habitual felon were a principal charge.’” *State v. Gilmore*, 142 N.C. App. 465, 471, 542 S.E.2d 694, 698–99 (2001) (quoting N.C. Gen. Stat. § 14-7.5). Under N.C. Gen. Stat. § 14-7.5, the issue of whether a defendant is an habitual felon is submitted to the jury. *Id.* A defendant may, in the alternative, enter a guilty plea to the charge of being an habitual felon. *See State v. Williams*, 133 N.C. App. 326, 330, 515 S.E.2d 80, 83 (1999).

However, a defendant’s mere stipulation to predicate felonies is insufficient. *See Williams*, 133 N.C. App. at 330, 515 S.E.2d at 83 (stipulation to habitual felon status is only tantamount to a guilty plea, when, subsequent to defendant’s stipulation, the trial court asked defendant “questions to establish a record of her plea of guilty” and defendant “informed the court that she understood that her stipulations would give up her right to have a jury determine her status as an

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1. We note this result is consistent with two unpublished opinions of this Court. *See State v. Herring*, No. COA07-1506, 2008 WL 2582518 (N.C. Ct. App. July 1, 2008); *State v. Nivens*, No. COA02-1601, 2004 WL 1191902 (N.C. Ct. App. June 1, 2004). While these cases are not binding, we find their rationale persuasive, especially in light of the fact that six judges of this Court have concurred in the result.

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habitual felon”); *see also* N.C. Gen. Stat. § 15A-1022(a) (2011) (trial court may not accept guilty plea without first addressing defendant personally and making inquiries of defendant as required by statute).

Our holding in *Gilmore* applying these principles is controlling in this case. Like the defendant in *Gilmore*, Defendant stipulated at his sentencing hearing to the three predicate felonies alleged by the State. In both cases, the issue was not presented to the jury, nor did the trial court establish a record of a guilty plea. *See Gilmore*, 142 N.C. App. at 471, 542 S.E.2d at 699 (holding that a defendant’s stipulation to habitual felon status “in the absence of an inquiry by the trial court to establish a record of a guilty plea, is not tantamount to a guilty plea.”). Accordingly, we vacate Defendant’s habitual felon conviction.

**IV. Conclusion**

For the foregoing reasons, Defendant’s convictions for Possession of a Firearm by a Felon and for having attained habitual felon status are

VACATED.

Judges GEER and STROUD concur.

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STATE OF NORTH CAROLINA  
v.  
JOMRI JARELLE WILSON

No. COA12-954

Filed 5 February 2013

**1. Larceny—after breaking or entering—findings of fact—conclusions of law—immediately after conclusion of suppression hearing not required**

The trial court did not err in a larceny after breaking or entering case by failing to make findings of fact and conclusions on the record immediately at the conclusion of the suppression hearing. The trial court complied with N.C.G.S. § 15A-977(f) and did not err by entering its written order.

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**2. Identification of Defendants—motion for mistrial—smaller photograph of defendant—not impermissibly suggestive—due process**

The trial court did not err in a larceny after breaking or entering case by denying defendant's motion for a mistrial. There was no case supporting the proposition that admission of an identification based on a smaller photograph was an error resulting in substantial and irreparable prejudice requiring mistrial. The size discrepancy was not impermissibly suggestive. Because the procedure was not impermissibly suggestive, the due process analysis ended.

Appeal by Defendant from judgment entered 13 January 2012 by Judge Yvonne Mims Evans in Superior Court, Mecklenburg County. Heard in the Court of Appeals 28 January 2013.

*Attorney General Roy Cooper, by Special Deputy Attorney General V. Lori Fuller, for the State.*

*Heather L. Rattelade for Defendant.*

McGEE, Judge.

Jomri Jarelle Wilson (Defendant) filed a motion on 5 December 2011 to suppress the identification of Defendant, based on violations of his due process rights and the Eyewitness Identification Reform Act, N.C. Gen. Stat. § 15A-284.52. The trial court entered an order on 13 January 2012 denying Defendant's motion to suppress. A jury found Defendant guilty of larceny after breaking or entering on 13 January 2012. Defendant appeals.

[1] Defendant's first argument on appeal is that the trial court erred by failing "to make findings of fact and conclusions on the record at the conclusion of the suppression hearing." We disagree.

N.C. Gen. Stat. § 15A-977(f), which governs procedures for motions to suppress, requires that the judge "set forth in the record his findings of facts and conclusions of law." N.C. Gen. Stat. § 15A-977(f) (2011). Defendant appears to contend that the trial court should make findings immediately after the suppression hearing. However, the statute does not require the trial court to do so. "The statute does not require that the findings be made in writing at the time of the ruling. Effective appellate review is not thwarted by the subsequent order." *State v. Lippard*, 152 N.C. App. 564, 572, 568 S.E.2d 657, 662

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(2002). The trial court complied with N.C. Gen. Stat. § 15A-977(f), and did not err by entering its written order on 13 January 2012.

**[2]** Defendant's second argument on appeal is that the trial court erred in denying his motion for a mistrial. A "trial court's decision concerning a motion for mistrial will not be disturbed on appeal unless there is a clear showing that the trial court abused its discretion." *State v. Horton*, 200 N.C. App. 74, 81, 682 S.E.2d 754, 759 (2009). "The judge must declare a mistrial upon the defendant's motion if there occurs during the trial an error or legal defect in the proceedings . . . resulting in substantial and irreparable prejudice to the defendant's case." N.C. Gen. Stat. § 15A-1061 (2011).

Defendant contends that the procedure was impermissibly suggestive because Defendant's photograph was smaller, officers failed to ensure the photograph resembled Defendant at the time of the offense, and officers failed to ensure the other photographs resembled the eyewitness's description.

Defendant conflates two separate arguments. The failure to ensure that the photograph resembled Defendant and that the other photographs resembled the witness's description is relevant to N.C. Gen. Stat. § 15A-284.52, the Eyewitness Identification Reform Act. Remedies for statutory violations are specifically provided in N.C. Gen. Stat. § 15A-284.52(d). In accordance with that subsection, the trial court in this case instructed the jury that it "may consider what evidence [it] find[s] to be credible concerning compliance or non-compliance with such requirements in determining the reliability of eyewitness identification."

The size of the photographs is relevant to a second argument, a due process challenge. Our Supreme Court held that "identification procedures which are so impermissibly suggestive as to give rise to a very substantial likelihood of misidentification violate a defendant's right to due process." *State v. Hannah*, 312 N.C. 286, 290, 322 S.E.2d 148, 151 (1984). We employ a two-step analysis to review this type of challenge. First, we determine "whether an impermissibly suggestive procedure was used in obtaining the out-of-court identification." *Id.* The "test is whether the totality of the circumstances reveals a pre-trial procedure so unnecessarily suggestive and conducive to irreparable mistaken identity as to offend fundamental standards of decency and justice." *Id.*

In challenges to photographic lineup identifications, our Supreme Court "has considered pertinent aspects of the array, such as similar-

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ity of appearance of those in the array and any attribute of the array tending to focus the witness' attention on any particular person therein, as factors in determining whether the identification procedures are impermissibly suggestive." *State v. Rogers*, 355 N.C. 420, 432, 562 S.E.2d 859, 868 (2002).

The trial court found that the officer "used fillers for the line-up of young black men with similar hair styles, height, weight and facial expressions. . . . The photograph of [D]efendant was smaller than the photographs of the five fillers."

Defendant cites no case in support of the proposition that admission of an identification based on a smaller photograph is an error resulting in substantial and irreparable prejudice requiring mistrial, and our research reveals no such case. The size discrepancy was not impermissibly suggestive.

Because we have determined that the procedure was not impermissibly suggestive, our due process analysis ends here. *State v. Stowes*, \_\_\_ N.C. App. \_\_\_, \_\_\_, 727 S.E.2d 351, 357 (2012); *Rogers*, 355 N.C. at 433, 562 S.E.2d at 869. Therefore, we need not determine, under the second step in the due process review, whether the procedure created a substantial likelihood of irreparable misidentification by weighing the factors of the identification's reliability against the "corrupting effect of the suggestive identification itself" set out in *Manson v. Brathwaite*, 432 U.S. 98, 114, 53 L. Ed. 2d. 140, 154 (1977).

The trial court did not abuse its discretion in denying Defendant's motion for a mistrial.

No error.

Chief Judge MARTIN and Judge CALABRIA concur.

**TAFT v. BRINLEY'S GRADING SERVS., INC.**

[225 N.C. App. 502 (2013)]

DONNA W. TAFT, ADMINISTRATRIX OF THE ESTATE OF MICHAEL WAYNE PAUL, JR., PLAINTIFF  
v.  
BRINLEY'S GRADING SERVICES, INC., ISMAEL DOMINGUEZ AND THOMAS E.  
BRINLEY, SR., DEFENDANTS

No. COA12-790

Filed 5 February 2013

**1. Workers' Compensation—special employee—summary judgment improper**

The trial court erred in a wrongful death case by granting summary judgment to defendant Brinley's Grading based on the exclusivity provision of the Workers' Compensation Act under N.C.G.S. § 97-10.1. The evidence in the record gave rise to genuine issues of material fact regarding whether decedent, who was actually employed by a company other than Brinley's Grading, amounted to a "special employee" subject to the Workers' Compensation Act's exclusivity provision.

**2. Wrongful Death—vicarious liability—negligence—scope of employment**

The trial court erred in a wrongful death case by granting summary judgment to defendant Brinley's Grading on the issue of its vicarious liability for any negligence by defendant Dominguez. The evidence tended to show that Dominguez was acting within the scope of his employment and in furtherance of Brinley's Grading's business when the alleged negligence occurred, and evidence that Dominguez was forbidden from starting or otherwise operating the truck involved in the accident would not necessarily remove Dominguez from the course and scope of employment.

**3. Employers and Employees—negligent hiring, supervision, and retention—compliance with company policy—wrongful death—no actual or constructive notice**

The trial court did not err in a wrongful death case by granting summary judgment on plaintiff's claim that defendant Brinley's Grading was independently negligent by failing to reasonably supervise defendant Dominguez to ensure that he complied with the company's vehicle policy, reasonably trained Dominguez regarding the policy, and secured the company vehicles' keys in a manner that would prevent unqualified employees from accessing them. There was no evidence that Brinley's Grading had actual or constructive notice of Mr. Dominguez'



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inherent unfitness regarding his duties or of prior negligence committed by Mr. Dominguez.

**4. Employer and Employee—implementation of company safety policies—supervision—no reasonable foreseeability**

The trial court erred in a wrongful death case by granting summary judgment in favor of defendant Brinley. There was no evidence that Brinley's role in implementation of the company's safety policies was negligent since there was no showing that Brinley should have reasonably foreseen that more supervision was required to prevent defendant Dominguez' deliberate violation of company policy.

Appeal by plaintiff from orders entered 4 January 2012 by Judge W. Russell Duke, Jr. in Pitt County Superior Court. Heard in the Court of Appeals 11 September 2012.

*Abrams & Abrams, P.A., by Douglas B. Abrams, Margaret S. Abrams, and Noah B. Abrams; and Taft, Taft & Haigler, P.A., by Thomas F. Taft, for plaintiff-appellant.*

*Bryant, Lewis & Lindsley, P.A., by David O. Lewis, for defendants-appellees Brinley's Grading Services, Inc. and Thomas E. Brinley, Sr.*

GEER, Judge.

Plaintiff Donna W. Taft, administratrix for the Estate of Michael Wayne Paul, Jr., appeals from the trial court's orders granting summary judgment to defendants Brinley's Grading Services, Inc. and Thomas E. Brinley, Sr. Plaintiff brought a wrongful death action based upon a workplace accident resulting in Mr. Paul's death. Plaintiff primarily argues on appeal that the trial court erred in granting summary judgment to Brinley's Grading on plaintiff's claims based on the exclusivity provision of the Workers' Compensation Act. *See* N.C. Gen. Stat. § 97-10.1 (2011). We agree that the evidence in the record gives rise to genuine issues of material fact regarding whether Mr. Paul, who was actually employed by a company other than Brinley's Grading, amounted to a "special employee" subject to the Workers' Compensation Act's exclusivity provision.

Because we also find that plaintiff presented sufficient evidence to defeat summary judgment of Brinley's Grading's vicarious liability for the acts of defendant Ismael Dominguez, we reverse the trial

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court's order entering summary judgment for Brinley's Grading. We affirm the order granting summary judgment to Mr. Brinley.

Facts

On 14 February 2008, Mr. Paul was an employee of Pro-Tech Management & Equipment Services, Inc. and was working at Brinley's Grading's facility in Durham, North Carolina pursuant to an "Employee Leasing Agreement" between Pro-Tech and Brinley's Grading. At approximately 7:20 a.m., Mr. Paul was beside a large commercial trailer working to load it for travel to a worksite. At the same time, Mr. Dominguez, an employee of Brinley's Grading, started a Brinley's Grading pickup truck that was facing the trailer, put the truck in gear, and popped the clutch. The truck lunged forward and pinned Mr. Paul in between the front bumper of the truck and the trailer. As a result of the collision, Mr. Paul sustained injuries leading to his death.

On 26 January 2010, plaintiff filed a wrongful death action against Brinley's Grading, Mr. Brinley (the president of Brinley's Grading), and Mr. Dominguez asserting that Mr. Paul's death was the result of their negligence. On 31 March 2010, Brinley's Grading and Mr. Brinley filed an answer denying the material factual allegations of the complaint and asserting as defenses contributory negligence and the fellow servant doctrine. Mr. Dominguez, who left the scene immediately after the accident, did not file an answer, has not been located by the parties since the accident, and was never interviewed or deposed.

On 15 November 2011, Brinley's Grading filed a motion for summary judgment. Brinley's Grading contended that Mr. Paul was a "special employee" of Brinley's Grading and a fellow servant of Mr. Dominguez at the time of the accident and, therefore, plaintiff's claims were barred by the exclusivity provision of the Workers' Compensation Act set out in N.C. Gen. Stat. § 97-10.1 and the fellow servant doctrine. Brinley's Grading further argued that Ms. Taft could not show that Mr. Dominguez was acting within the scope of his employment, that Brinley's Grading was in any way negligent, or that any negligence was the proximate cause of Mr. Paul's death.

Also on 15 November 2011, Mr. Brinley filed a separate motion for summary judgment. Mr. Brinley argued that Ms. Taft could not show that Mr. Brinley was responsible for the day-to-day operations of Brinley's Grading, that Mr. Brinley was in any way negligent, that any negligence was the proximate cause of Mr. Paul's death, or that Mr. Brinley possessed actual or constructive knowledge of any dangerous

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condition existing on the premises of the Durham facility where the accident occurred.

On 4 January 2012, the trial court entered an order granting summary judgment to Brinley's Grading and a separate order granting summary judgment to Mr. Brinley. Plaintiff timely appealed both orders to this Court.

Discussion

A motion for summary judgment may be granted "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." N.C.R. Civ. P. 56(c). In deciding the motion, "all inferences of fact . . . must be drawn against the movant and in favor of the party opposing the motion." *Caldwell v. Deese*, 288 N.C. 375, 378, 218 S.E.2d 379, 381 (1975) (quoting 6 James W. Moore et al., *Moore's Federal Practice* § 56-15[3], at 2337 (2d ed. 1971)).

The party moving for summary judgment has the burden of establishing the lack of any triable issue. *Collingwood v. Gen. Elec. Real Estate Equities, Inc.*, 324 N.C. 63, 66, 376 S.E.2d 425, 427 (1989). Once the moving party meets its burden, then the non-moving party must "produce a forecast of evidence demonstrating that the plaintiff will be able to make out at least a prima facie case at trial." *Id.* We review a trial court's grant of summary judgment de novo. *Coastal Plains Utils., Inc. v. New Hanover Cnty.*, 166 N.C. App. 333, 340-41, 601 S.E.2d 915, 920 (2004).

I

[1] Plaintiff first contends that the trial court erred in granting summary judgment to Brinley's Grading based on the exclusivity provision of the Workers' Compensation Act contained in N.C. Gen. Stat. § 97-10.1. N.C. Gen. Stat. § 97-10.1 provides:

If the employee and the employer are subject to and have complied with the provisions of this Article, then the rights and remedies herein granted to the employee, his dependents, next of kin, or personal representative shall exclude all other rights and remedies of the employee, his dependents, next of kin, or representative as against the employer at common law or otherwise on account of such injury or death.

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Under the Act, “‘employee’” is defined in part as “every person engaged in an employment under any appointment or contract of hire or apprenticeship, express or implied, oral or written . . . .” N.C. Gen. Stat. § 97-2(2) (2011).

In addition to the definition of employee set out in the Workers’ Compensation Act, our courts have adopted the “special employment” doctrine, which provides that, for purposes of the Workers’ Compensation Act, “under certain circumstances a person can be an employee of two different employers at the same time.” *Brown v. Friday Servs., Inc.*, 119 N.C. App. 753, 759, 460 S.E.2d 356, 360 (1995). When the special employment doctrine applies, the joint liability under the Act of the company that directly employs the employee (the “general” employer) and a second company (the “special” employer) provides the plaintiff-employee with two separate potential sources of workers’ compensation benefits. *Shelton v. Steelcase, Inc.*, 197 N.C. App. 404, 410, 677 S.E.2d 485, 491 (2009); *Brown*, 119 N.C. App. at 759, 460 S.E.2d at 360. However, under the special employment doctrine, the employee’s receipt of workers’ compensation benefits from either employer bars the employee from proceeding at common law against either of the employers. *Id.*

Defendants contend that the exclusivity provision applies to bar plaintiff’s claims against Brinley’s Grading because Mr. Paul qualified as an employee of both Pro-Tech and Brinley’s Grading under the Workers’ Compensation Act pursuant to the special employment doctrine, and plaintiff had already received workers’ compensation benefits from Pro-Tech.

Our courts apply a three-prong test to determine whether the employee is a “special employee” for purposes of the Workers’ Compensation Act’s exclusivity provision:

“When a general employer lends an employee to a special employer, the special employer becomes liable for workmen’s compensation only if:

- (a) the employee has made a contract of hire, express or implied, with the special employer;
- (b) the work being done is essentially that of the special employer; and
- (c) the special employer has the right to control the details of the work.

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When all three of the above conditions are satisfied in relation to both employers, both employers are liable for worker's compensation."

*Anderson v. Demolition Dynamics, Inc.*, 136 N.C. App. 603, 606, 525 S.E.2d 471, 473 (2000) (quoting 3 Arthur Larson & Lex K. Larson, *Larson's Workers' Compensation Law* § 67 (1999)). In addition, "[c]ontinuation of the 'general' employment is presumed, and the party asserting otherwise must make a 'clear demonstration that a new . . . employer [was] substituted for the old.'" *Id.* at 607, 525 S.E.2d at 473 (quoting *Larson's* § 67.02).

The first prong of the special employer test asks whether Mr. Paul entered into a contract for hire with Brinley's Grading. This Court has described the "contract requirement" as "crucial" because the application of the special employment doctrine results in the employee losing the right to sue the special employer at common law for negligence. *Id.*

In *Anderson*, the defendant—much like defendants here—argued that the first prong was established by evidence that the decedent "'expressly accepted'" employment with the defendant when, after being contacted by the defendant, he sought permission from the general employer to work at the defendant's site and then "'accepted that assignment'" by coming to the worksite. *Id.* at 608, 525 S.E.2d at 474. This Court held that "[t]hese actions standing alone do not conclusively satisfy the contract for employment prong of the special employer test." *Id.*

In concluding that issues of fact existed regarding the first prong, the Court went on to note other evidence including, among other things, that the decedent was paid by and insured through the general employer, although the defendant reimbursed the general employer for 40% of the decedent's salary, and the defendant neither paid payroll taxes on behalf of the decedent nor claimed him as an employee for insurance purposes. *Id.* Further, the decedent represented to third parties that he was an employee of the general employer. *Id.* The Court held that "[c]onsideration of all the above evidence in the light most favorable to plaintiff raises at a minimum a genuine factual issue as to the first prong of the special employer test, *i.e.*, whether there was an employment contract between defendant and decedent." *Id.* at 609, 525 S.E.2d at 474 (internal citation omitted).

Similarly, this Court concluded in *Shelton* that a jury issue existed as to the first prong. 197 N.C. App. at 412, 677 S.E.2d at 492. The

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defendant claimed that there was an implied employment agreement with the plaintiff because the plaintiff was hired by the general employer for the express purpose of working for the defendant, she had her own office at the defendant's plant, and she worked at the defendant's plant full time. *Id.* at 411, 677 S.E.2d at 492. This Court, however, concluded that the evidence was less compelling than the evidence found insufficient in *Anderson*.

In *Shelton*, the defendant had not contacted the plaintiff, but rather had entered into a contract with the general employer to provide cleaning services, and the general employer had chosen to provide those services by assigning the plaintiff to work for the defendant. *Id.* at 412, 677 S.E.2d at 492. The contract specifically provided that personnel supplied by the general employer to the defendant would " 'be employees of the [the general employer].' " *Id.* Further, the record contained evidence from witnesses identifying the plaintiff as an employee of the general employer and evidence that the general employer paid the plaintiff, withheld her taxes, was responsible for her workers' compensation insurance, and paid her benefits. *Id.*

This case is materially indistinguishable from *Shelton* and, like *Shelton*, less compelling than *Anderson*. Brinley's Grading argues that an implied contract existed between Mr. Paul and Brinley's Grading because Mr. Paul "accepted tasks assigned to him by Brinley's Grading on Brinley's Grading premises and under the direction and control of Brinley's Grading personnel and subject to Brinley's Grading regulations and guidelines." This contention is essentially identical to the argument rejected in *Anderson*.

Moreover, the Employee Leasing Agreement ("the Agreement") provided: "The parties understand that Pro-Tech is an independent contractor, and that all of the personnel assigned by Pro-Tech to Brinley's business in order to fill the relevant job positions are employees of Pro-Tech and only Pro-Tech." Further, under the Agreement, "Pro-Tech acknowledges that it is responsible for all matters related to the payment of federal, state and local payroll taxes, workers' compensation insurance, salaries and fringe benefits for its employees." Additionally, Pro-Tech was required by the Agreement to maintain its own general liability, professional malpractice, and automobile liability insurance for actions and omissions of leased Pro-Tech employees. Finally, in a Rule 30(b)(6) deposition for Brinley's Grading given by its president, Mr. Brinley, Brinley's Grading conceded that, pursuant to the Agreement, Mr. Paul was solely an employee of Pro-Tech.

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Under *Anderson* and *Shelton*, this evidence was sufficient to give rise to an issue of fact on the first prong of the special employer test. See also *Gregory v. Pearson*, 224 N.C. App. 580, 586, 736 S.E.2d 577, 581 (2012) (holding first prong of special employer test not met based upon provision in contract between temporary employment agency and alleged special employer that “expressly stated temporary employees are not employees of the [alleged special employer]”).

Turning to the third prong, *Anderson* observed that this prong, “control of the detail of the work, may be the most significant.” 136 N.C. App. at 609, 525 S.E.2d at 474. The Court, in *Anderson*, noted that although the defendant’s supervisor directed the decedent regarding what needed to be done, “no evidence was presented that the latter was told *how* to do the specific tasks assigned.” *Id.* at 610, 525 S.E.2d at 475. Instead, evidence existed that the decedent was in charge of part of the work and not subject to the supervisor’s control as to the details of his work, which the Court concluded was not sufficient to suggest such supervision and control as to justify implying that the decedent had consented to enter into a special employment relationship. *Id.* As a result, the Court concluded that rather than pointing to evidence justifying summary judgment for the defendant, the defendant had “at best . . . shown a genuine issue of material fact as to the third prong of the special employer test, defendant’s control over the details of decedent’s work.” *Id.* at 611, 525 S.E.2d at 475.

In *Shelton*, this Court pointed out that the defendant’s evidence simply showed that the defendant’s managers identified what work needed to be done, but did not establish that the defendant had the right to tell the plaintiff how to go about completing the projects it assigned. 197 N.C. App. at 413, 677 S.E.2d at 493. “Even more significantly,” however, “the contract between [the defendant] and [the general employer] specified in a provision entitled ‘Supervision’: ‘[The general employer] will be solely responsible for the direction and supervision of personnel assigned to the facility, except that maintenance supervisor shall direct the duties of two (2) employees assigned to his/her department’ ”—the latter proviso did not apply to the plaintiff. *Id.*

This Court pointed out: “As our Supreme Court has observed, ‘[e]mployment, of course, is a matter of contract. Thus, where the parties have made an explicit agreement regarding the right of control, this agreement will be dispositive.’ ” *Id.* (quoting *Harris v.*

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*Miller*, 335 N.C. 379, 387, 438 S.E.2d 731, 735 (1994)). The Court observed that the defendant “specifically chose to require, by contract, that [the general employer] be ‘solely responsible for the direction and supervision’ of [the plaintiff]. That contract provides sufficient evidence to warrant submission of the special employee issue to the jury. [The defendant] cannot blindly disregard its own contract in order to argue that no issue of fact existed for the jury to decide.” *Id.* at 413-14, 677 S.E.2d at 493.

Here, the Agreement provided in relevant part:

In order to carry out its obligations hereunder, Pro-Tech may designate one or more “on-site supervisors” from among the employees assigned to fill job positions for Brinley’s. The on-site supervisors shall oversee administrative and managerial matters relating to Pro-Tech’s leased employees and shall be under the direct supervision of the Pro-Tech management team. If Pro-Tech does not elect to designate on-site supervisors, Pro-Tech’s leased employees who are assigned to Brinley’s shall be responsible to the Pro-Tech management team. *The on-site supervisors or the management team shall determine the policies and procedures to be followed by Pro-Tech’s leased employees regarding the time and performance of their duties. Brinley’s shall cooperate with Pro-Tech in the formation of such policies and procedures and shall permit Pro-Tech to implement the same.*

(Emphasis added.)

The Agreement further provided:

Brinley’s expressly acknowledges, however, . . . Brinley’s may *assist* in recruiting, hiring, evaluating, replacing, *supervising*, disciplining and firing Pro-Tech employees; however, *Pro-Tech shall retain ultimate control over such matters.*

(Emphasis added.)

Brinley’s Grading thus chose to contractually agree that Pro-Tech, and not Brinley’s Grading, would control and direct Mr. Paul’s work. According to the Agreement, Brinley’s Grading, at most, “assist[ed]” in personnel decisions, including supervision. Under *Shelton*, the Agreement is sufficient to create a genuine issue of material fact as to



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the third prong. Brinley's Grading cannot obtain summary judgment by ignoring the terms of the contract into which it chose to enter.

Defendants, however, point to an affidavit by Chadwick Brinley, a vice-president of Brinley's Grading, which stated:

At all times when performing work for [Brinley's Grading], [Mr. Paul] was under the sole direction, control and supervision of [Brinley's Grading] with regard to his assigned tasks. Such direction included the manner in which he was to perform his duties, the locations at which said duties were to be performed and the time within which such duties were to be performed.

While plaintiff argues that we should not consider Chadwick Brinley's affidavit because it contradicts the Rule 30(b)(6) deposition given by Brinley's Grading's president, we need not resolve that issue since this affidavit when juxtaposed with the Agreement, at most, raises an issue of fact. It cannot, in light of the Agreement, support summary judgment in Brinley's Grading's favor.

In sum, we hold that genuine issues of material fact exist regarding the first and third prongs of the special employment test. We, therefore, need not decide whether defendants have conclusively established the second prong. *See id.* at 411, 677 S.E.2d at 492 ("We need not address the second prong because [the defendant] has failed to establish that no issue of fact exists as to the first and third prongs[.]"); *Anderson*, 136 N.C. App. at 607, 525 S.E.2d at 473 ("For purposes of our ruling herein, we assume *arguendo* that the second prong of the special employer test has been met. However, we conclude the record reveals genuine issues of material fact as to the remaining prongs.").

Defendants nonetheless cite *Poe v. Atlas-Soundelier/Am. Trading & Prod. Corp.*, 132 N.C. App. 472, 512 S.E.2d 760 (1999), and *Brown* in support of their argument. In *Poe*, however, the plaintiff conceded that the defendant was a "co-employer" with the temporary employment agency that supplied him to the defendant. 132 N.C. App. at 476, 512 S.E.2d at 763. *Poe* addressed a different issue and is not applicable here.

*Brown* did not involve a contract between the general employer and alleged special employer with terms similar to those in this case and in *Shelton*—terms that specified that the worker was an

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employee of the general employer and that the worker performed under the direction and supervision of the general employer. *See Brown*, 119 N.C. App. at 759-60, 460 S.E.2d at 360-61. *See also Gregory*, 244 N.C. App. at 586, 736 S.E.2d at 581 (distinguishing *Brown* because, unlike in *Brown*, contract at issue between general employer and alleged special employer in *Gregory* “expressly stated temporary employees are not employees of the [alleged special employer]”). Consequently, we conclude that summary judgment in favor of Brinley’s Grading cannot be affirmed based upon N.C. Gen. Stat. § 97-10.1 and the special employment doctrine.

## II

[2] Plaintiff next argues that the trial court improperly granted summary judgment to Brinley’s Grading because, in the light most favorable to plaintiff, a genuine issue of material fact existed as to Brinley’s Grading’s vicarious liability for Mr. Dominguez’ negligence under a theory of respondeat superior. Defendants contend that undisputed evidence shows that Brinley’s Grading cannot be vicariously liable for Mr. Dominguez’ alleged negligence in operating the truck because Mr. Dominguez was forbidden, by company policy, from operating any company vehicle. According to Brinley’s Grading, Mr. Dominguez was, therefore, acting outside of the scope of his employment when the alleged negligence occurred.

Employers are liable for torts committed by their employees under a respondeat superior “theory when the employee’s act is ‘expressly authorized; . . . committed within the scope of [the employee’s] employment and in furtherance of his master’s business —when the act comes within his implied authority; . . . [or] when ratified by the principal.’ ” *Medlin v. Bass*, 327 N.C. 587, 592, 398 S.E.2d 460, 463 (1990) (quoting *Snow v. DeButts*, 212 N.C. 120, 122, 193 S.E. 224, 226 (1937)). “Thus, where the employee’s action is not expressly authorized or subsequently ratified, an employer is liable only if the act is ‘committed within the scope of . . . and in furtherance of [the employer’s] business.’ ” *Id.* at 593, 398 S.E.2d at 463 (quoting *Snow*, 212 N.C. at 122, 193 S.E. at 226).

This Court has explained regarding the scope of employment:

“It is well settled in this State that [i]f the act of the employee was a means or method of doing that which he was employed to do, *though the act be unlawful and*

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*unauthorized or even forbidden*, the employer is liable for the resulting injury, but he is not liable if the employee departed, however briefly, from his duties in order to accomplish a purpose of his own, which purpose was not incidental to the work he was employed to do.”

*Estes v. Comstock Homebuilding Cos.*, 195 N.C. App. 536, 545, 673 S.E.2d 399, 404-05 (2009) (emphasis added) (quoting *Hogan v. Forsyth Country Club Co.*, 79 N.C. App. 483, 491-92, 340 S.E.2d 116, 122 (1986)). Accordingly, “[p]erforming a forbidden act does not necessarily remove an employee from the course and scope of employment.” *Id.* at 544, 673 S.E.2d at 404. See also *Johnson v. Lamb*, 273 N.C. 701, 707, 161 S.E.2d 131, 137 (1968) (“If an employee is negligent while acting in the course of employment and such negligence is the proximate cause of injury to another, the employer is liable in damages under the doctrine of *respondeat superior*, notwithstanding the fact that the employer, himself, exercised due care in the supervision and direction of the employee, *the employee’s violation of instructions being no defense to the employer.*” (emphasis added)).

In *Estes*, the Court affirmed the trial court’s entry of partial summary judgment for the plaintiff and against the defendant realty company for damages to a model home caused when the company’s employee failed to extinguish a cigarette she was smoking on the premises. 195 N.C. App. at 538, 544, 545, 673 S.E.2d at 401, 404, 405. The defendant contended that an issue of fact existed precluding summary judgment regarding whether its employee was permitted to smoke on the premises. *Id.* at 544, 673 S.E.2d at 404.

In rejecting this argument, this Court explained: “[W]hether [the employee] was permitted to smoke on the deck of the model home is not relevant to the analysis in this case. The issue here is whether [the employee] was in the scope of her employment, and about the business of her employer, when the negligent act occurred. Performing a forbidden act does not necessarily remove an employee from the course and scope of employment.” *Id.* Summary judgment was proper because “(1) [the employee] was on the premises of her employer where she was required to be, able and willing to perform her duties; and (2) the negligence occurred when she went to perform one of those duties, answering the telephone.” *Id.* at 541, 673 S.E.2d at 402.

Here, there is no dispute that Mr. Dominguez was employed by Brinley’s Grading as a laborer and that Brinley’s Grading owned the

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truck, started by Mr. Dominguez, that caused the accident. A description of the accident was recorded in an "Employee Accident Report" and a "Vehicle Accident Report" completed by Chad Brinley as vice-president of Brinley's Grading.<sup>1</sup> According to the Vehicle Accident Report, "Edward Alston was late for work because of weather conditions. [Mr. Dominguez] took it upon himself to start the truck." The Employee Accident Report explained further that Mr. Paul "was loading pine straw on his trailer when [Mr. Dominguez] decided to start [the] truck that [Mr. Paul] parked in front of. As [Mr. Dominguez] started the truck it lunged forward from his foot slipping off the clutch we assume."

In addition, Shay Wingate, a North Carolina Department of Labor, Occupational Safety and Health Administration ("OSHA") inspector, prepared an OSHA inspection report following a fatality inspection of Brinley's Grading arising out of the accident.<sup>2</sup> Mr. Wingate arrived at the Brinley's Grading premises at approximately 8:30 a.m. on the morning of the accident, personally observed the accident location, and conducted interviews with Brinley's Grading employees. In the report, Mr. Wingate found that "the temperature was 30°F the day of the accident." He also found that "Mr. Paul was responsible for loading and delivering pine straw to the job sites the day of the inspection," other employees "were walking towards the back of the 53 foot trailer to unload bales of pine straw at the time of the accident," and a different employee "was standing on top of the goose neck trailer and was stacking the bales of pine straw directly above the victim."

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1. Based upon Rule 30(b)(6) deposition testimony by Chad and Thomas Brinley, the Brinley's Grading Employee Accident Report and Vehicle Accident Report qualify as business records and, thus, are admissible under Rule 803(6) of the Rules of Evidence as exceptions to the hearsay rule. *See In re S.D.J.*, 192 N.C. App. 478, 482, 665 S.E.2d 818, 821 (2008) ("A qualifying business record is admissible when a proper foundation . . . is laid by testimony of a witness who is familiar with the . . . records and the methods under which they were made so as to satisfy the court that the methods, the sources of information, and the time of preparation render such evidence trustworthy." (internal quotation marks omitted)).

2. The OSHA report was admissible under Rule 803(8)(c) of the North Carolina Rules of Evidence as a public record. *See Haymore v. Thew Shovel Co.*, 116 N.C. App. 40, 46, 446 S.E.2d 865, 869 (1994) (holding that trial court properly admitted OSHA report pursuant to Rule 803(8)); *Bolick v. Sunbird Airlines, Inc.*, 96 N.C. App. 443, 446, 386 S.E.2d 76, 77 (1989) (explaining that, although factual findings from official investigative reports are admissible under Rule 803(8)(c), "any hearsay contained in the report must also fall under one of the hearsay exceptions"), *aff'd per curiam*, 327 N.C. 464, 396 S.E.2d 323 (1990).

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Viewed in the light most favorable to plaintiff, this evidence tended to show that Mr. Dominguez was on the premises of his employer, Brinley's Grading, during work hours, on a cold morning, when other employees, including other laborers, were engaged in the process of loading pine straw to be driven to work sites. Mr. Dominguez took it upon himself to start up a work truck because another employee was late to work. Thus, like the employee in *Estes*, Mr. Dominguez was "on the premises of h[is] employer where [he] was required to be" and appeared to be "able and willing to perform h[is] duties." *Id.*

Moreover, also like the evidence in *Estes*, the evidence here tended to show that Mr. Dominguez' alleged negligence occurred while he was performing his assigned duties of preparing for employees to drive to a work site. A reasonable juror could find that Mr. Dominguez was engaged in a " 'means or method of doing that which he was employed to do' " when the alleged negligence occurred. *Id.* at 545, 673 S.E.2d at 404 (quoting *Hogan*, 79 N.C. App. at 491, 340 S.E.2d at 122). Additionally, a reasonable juror could also find that Mr. Dominguez was acting in furtherance of Brinley's Grading's business when he started the truck.

Because this evidence tended to show that Mr. Dominguez was acting within the scope of his employment and in furtherance of Brinley's Grading's business when the alleged negligence occurred, evidence that Mr. Dominguez was forbidden from starting or otherwise operating the truck would "not necessarily remove [Mr. Dominguez] from the course and scope of employment." *Id.* at 544, 673 S.E.2d at 404. Accordingly, the trial court erred by granting summary judgment to Brinley's Grading on the issue of its vicarious liability for any negligence by Mr. Dominguez.

## III

[3] Plaintiff next argues that the trial court erred in granting summary judgment on plaintiff's claim that Brinley's Grading was independently negligent in failing to (1) reasonably supervise Mr. Dominguez to ensure that he complied with the company's vehicle policy; (2) reasonably train Mr. Dominguez regarding the policy; and (3) secure the company vehicles' keys in a manner that would prevent unqualified employees from accessing them. We disagree.

A claim for negligent hiring, supervision and retention is recognized in North Carolina when plaintiff proves:

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“(1) the specific negligent act on which the action is founded . . . (2) incompetency, by inherent unfitness or previous specific acts of negligence, from which incompetency may be inferred; and (3) *either actual notice to the master of such unfitness or bad habits, or constructive notice, by showing that the master could have known the facts had he used ordinary care in oversight and supervision, . . .*; and (4) that the injury complained of resulted from the incompetency proved.”

*Moricle v. Pilkington*, 120 N.C. App. 383, 386, 462 S.E.2d 531, 533 (1995) (quoting *Medlin*, 327 N.C. at 591, 398 S.E.2d at 462).

Thus, in order to survive defendants’ motion for summary judgment, plaintiff must show some evidence of: (1) Mr. Dominguez’ negligent act in attempting to start the truck; (2) Mr. Dominguez’ inherent unfitness to perform his duty or prior acts of negligence by Mr. Dominguez; (3) actual or constructive notice to Brinley’s Grading of Mr. Dominguez’ inherent unfitness or prior negligence; and (4) Mr. Paul’s death having resulted from Mr. Dominguez’ negligent act.

We find plaintiff’s failure to present any evidence of the third factor—actual or constructive notice to Brinley’s Grading of Mr. Dominguez’ inherent unfitness or prior negligence—dispositive. The record contains excerpts from the “BRINLEY’S GRADING SERVICE, INC. OCCUPATIONAL HEALTH AND SAFETY MANUAL” which, under the section heading “TRUCK DRIVERS, OPERATORS AND LABORERS HEALTH AND SAFETY RESPONSIBILITIES,” provides:

6. Do not operate equipment for which you have not been trained or authorized. If you have questions about the safe operation of a machine, contact your supervisor immediately. *Under no circumstances should machines be used in an unsafe manner or with safety features missing, malfunctioning, or circumvented.*

In addition, under the section heading “HEALTH AND SAFETY RULES,” the manual provides:

- Driver License Requirements—All employees who drive a company vehicle must possess and be able to present a valid North Carolina driver’s license. If an employee has had their driving privileges sus-

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pended or license revoked, The Company must be notified immediately.

. . . .

- Vehicle operators are responsible for knowledge of and compliance with all State and local laws and ordinances governing the use and operation of motor vehicles. . . .
- Before starting, make sure the vehicle is in safe operation condition before each trip. . . .

. . . .

- Only the assigned driver or other company personnel engaged in the course of their employment are permitted to drive company vehicles.

. . . .

- No employee is to check out keys to any Company Vehicle without prior authorization from the area manager at that particular Brinley shop. The area manager will designate one authorized driver per company vehicle at that shop and only that designated employee is to do his pre-inspection of his vehicle and be responsible for starting and moving this designated vehicle from its parking spot on the equipment lot at any time.
- Should any employee take it upon himself to procure the keys from the Key lock box and start or move any vehicle without specific authorization and direction from the area manager, it will be grounds for immediate termination of employment with Brinley's Grading Service, Inc., as this is a zero tolerance violation of Company Policy.

Mr. Brinley testified, in a Rule 30(b)(6) deposition, that the policies regarding the company's key lock box and the pairing of one driver to one vehicle were in place at the time of the accident. He further testified that because Mr. Dominguez did not have a license, Mr. Dominguez was not authorized to operate any Brinley's Grading vehicles.

Mr. Brinley also testified that all new Brinley's Grading hires, including laborers, are informed of the company vehicle policies, including the policy that "[o]nly this driver drives this truck. No one else drives this truck. No one else starts it. No one else moves it." Mr.

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Brinley further testified that these vehicle policies are also “reiterated in our safety meetings each month.” Chad Brinley likewise asserted, in an affidavit, that Mr. Dominguez “was expressly forbidden to operate any company vehicles.”

In addition, Mr. Brinley testified he was not aware of any prior occasion on which Mr. Dominguez had started, or otherwise operated, any Brinley's Grading vehicle for any purpose. Moreover, Mr. Brinley testified that, to the best of his knowledge, this was the first time any unauthorized Brinley's Grading employee had attempted to operate a Brinley's Grading vehicle. In accordance with the policy, Chad Brinley testified that any person who violated the policy, either by operating a vehicle when not authorized to do so, or permitting another to operate a vehicle that the other was not authorized to operate, would be terminated immediately.

We, therefore, disagree with plaintiff's assertion that “[t]here is simply no evidence whatsoever that Defendant Dominguez was ever told that he was unauthorized to operate the subject motor vehicle.” Moreover, plaintiff has pointed to no evidence that Mr. Dominguez was unaware of the company's vehicle policies.

Instead, plaintiff argues that “[t]here is no evidence that Defendant Dominguez was ever given the OSHA Manual or any other company manual. The manuals themselves come with forms in both English and Spanish for employees to sign to say that they have received the manual.” Plaintiff further asserts that defendants “failed to produce a single record or document showing that Defendant Dominguez was ever furnished with this manual.” However, plaintiff points to no evidence in the record, and we have found none, that supports plaintiff's claims that the Brinley's Grading manuals contained employee signature receipt provisions or, if they did, that Mr. Dominguez did not complete one. In any event, the record *does* contain evidence tending to show that Mr. Dominguez was made aware of the vehicle policies at the time of his hire, and we have found no evidence to the contrary.

Plaintiff, however, further argues: “Regardless of whether Defendant Dominguez was ever in fact told that he was not allowed to operate the vehicle, the undisputed fact is that he was able to obtain the keys for the vehicle when they were in the possession of Brinley's Grading, walk back to the truck, get inside the driver's seat of the truck, and start the truck during the start of the work day without anyone stopping him or preventing him from doing so.” Mr. Brinley testified that Mr. Dominguez could have easily obtained the



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keys to the truck from the company's lockbox without anybody seeing him. Plaintiff's argument implies that, by failing to more closely guard the lockbox, and then failing to stop Mr. Dominguez before he managed to start the vehicle, Brinley's Grading failed to adequately supervise Mr. Dominguez.

This court rejected a similar argument in *B. B. Walker Co. v. Burns Int'l Sec. Servs., Inc.*, 108 N.C. App. 562, 424 S.E.2d 172 (1993). There, the plaintiff appealed the trial court's grant of a directed verdict to the defendant employer on the plaintiff's claim for negligent supervision and retention. *Id.* at 566, 424 S.E.2d at 175. The defendant company had contracted with the plaintiff company to provide security guard services to the plaintiff. *Id.* at 564, 424 S.E.2d at 173. However, "[s]ubsequent to their assignment at plaintiff's manufacturing facility, the security guards supplied by defendant stole significant amounts of plaintiff's property, which the guards had been assigned to protect." *Id.*

On appeal, the plaintiff contended that "had the guards been properly or adequately 'supervised,' their thefts could have been prevented." *Id.* at 567, 424 S.E.2d at 175. The Court rejected that argument, reasoning that it "amount[ed] to no more than speculation that because defendant failed to adequately guard the guards, it was negligent." *Id.* The claim failed, the Court held, because there was no showing "that defendant should have reasonably foreseen that more supervision was required to prevent these deliberate criminal acts which were the cause of plaintiff's loss." *Id.*

As in *B. B. Walker Co.*, plaintiff has made no showing that Brinley's Grading should have reasonably foreseen that more supervision was required to prevent Mr. Dominguez' deliberate violation of company policy that resulted in Mr. Paul's death. As previously discussed, there is evidence tending to show Mr. Dominguez was aware of various company vehicle policies that forbid him from both accessing the keys to the truck and attempting to start the truck. Because the only evidence regarding enforcement of these policies tends to show that they had never before been violated, and particularly never before been violated by Mr. Dominguez, there was no evidence that Brinley's Grading had actual or constructive notice of Mr. Dominguez' inherent unfitness regarding his duties or of prior negligence committed by Mr. Dominguez. The trial court's grant of summary judgment to Brinley's Grading on this claim was, therefore, proper.

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## IV

[4] Finally, plaintiff argues that the trial court erred in granting summary judgment in favor of Mr. Brinley. Plaintiff specifically contends a genuine issue of material fact exists because there is evidence that Mr. Brinley “failed to ensure that policies and procedures regarding the use of his company’s vehicles was effectively communicated to its employees, such as Defendant Dominguez, who were operating such trucks in furtherance of their duties for his company” and that Mr. Brinley “failed to ensure that there were any safeguards to prevent keys for vehicles being taken from employees who were not to operate vehicles under his company’s policies.” Plaintiff then reasons that “[b]y failing to provide these safeguards and ensure that his own regulations were being followed, Mr. Brinley was negligent . . . .”

“[A]s a general rule an officer of a corporation is not liable for the torts of the corporation ‘merely by virtue of his office.’” *Wolfe v. Wilmington Shipyard, Inc.*, 135 N.C. App. 661, 670, 522 S.E.2d 306, 312-13 (1999) (quoting *United Artists Records, Inc. v. Eastern Tape Corp.*, 19 N.C. App. 207, 215, 198 S.E.2d 452, 457 (1973)). However, “an officer of a corporation ‘can be held personally liable for torts in which he actively participates[,]’ even though ‘committed when acting officially.’” *Id.*, 522 S.E.2d at 313 (quoting *Wilson v. McLeod Oil Co.*, 327 N.C. 491, 518, 398 S.E.2d 586, 600 (1990)).

In an affidavit, Mr. Brinley asserted that at the time of the accident he was not present at the Brinley’s Grading Durham facility; he “was not responsible for directing or controlling the work of company employees being performed on the premises, including any work being performed by . . . Ismael Dominguez on behalf of the company on the premises”; he was “unaware of any actions taken by Ismael Dominguez on the premises”; and “[a]t no time prior to the accident did [he] have any information from any source of any unsafe or dangerous actions of Ismael Dominguez.” Plaintiff points to no evidence contradicting this affidavit.

There is, however, some evidence that Mr. Brinley participated in the formation or implementation of the company safety policies at issue. Mr. Brinley testified that even though he had relinquished control of the company’s day-to-day operations to the company’s vice-presidents, Chad and Robby Brinley, Chad and Robby still met with Mr. Brinley to discuss “policies we might want or things we might want to update or things we might want to change or things along that line.”

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In addition, Mr. Brinley testified to the substance of Brinley's Grading's safety policies and then explained that it was company policy to hold safety meetings in which the policies were reiterated to employees. Regarding his own participation in those events, Mr. Brinley testified: "And I'm speculating on what goes on month to month, but these are the meetings when I handle them, which has been a number of years. But I have kind of passed on to [Robby] and Chad, so I'm sure that's what happens—reasonably sure." This evidence tended to show that, at the time of the accident, Mr. Brinley still participated in some company safety policy formation and that he had previously participated in the implementation of the company safety policies at issue.

Nevertheless, there is no evidence that Mr. Brinley's role in implementation of the company's safety policies was negligent. There is uncontradicted evidence that the policies at issue had, to Mr. Brinley's knowledge, never previously been violated by Mr. Dominguez or any other employee.

Plaintiff's suggestion that Mr. Dominguez' violation of Brinley's Grading's policies, standing alone, constitutes evidence of Mr. Brinley's negligent implementation of safety procedures is insufficient. *See B. B. Walker Co.*, 108 N.C. App. at 567, 424 S.E.2d at 175 (rejecting plaintiff's argument that, had employees of defendant been properly or adequately supervised, their thefts of plaintiff's property could have been prevented because it amounted to "no more than speculation" that because defendant failed to adequately supervise the employees, it was negligent).

Because there was no showing that Mr. Brinley "should have reasonably foreseen that more supervision was required" to prevent Mr. Dominguez' deliberate violation of company policy, plaintiff has failed to show any negligence by Mr. Brinley. *Id.* The trial court did not err in granting summary judgment as to plaintiff's claims against Mr. Brinley.

Affirmed in part, reversed in part.

Chief Judge MARTIN and Judge STROUD concur.

**WILLIAMS v. LYNCH**

[225 N.C. App. 522 (2013)]

MILDRED WILLIAMS, PLAINTIFF

v.

SHONDU LAMAR LYNCH, TYISHA STAFFORD, THOMAS C. RUFF, JR., D/B/A  
THOMAS C. RUFF, JR. & ASSOCIATES, AND FIRST CITIZENS BANK & TRUST  
COMPANY, DEFENDANTS

No. COA12-682

Filed 5 February 2013

**1. Statutes of Limitation and Repose—tolling—voluntary dismissal—new causes of action**

The trial court properly dismissed claims for breach of contract and conversion asserted against defendant Ruff and a conversion claim asserted against defendant First Citizens as barred by the statute of limitations where those claims appeared for the first time in a second complaint. The N.C.G.S. § 1A-1, Rule 41(a) tolling of the applicable statute of limitations applied only to the claims in the original complaint, and not to other causes of action that may have arisen out of the same set of operative facts.

**2. Statutes of Limitation and Repose—voluntary dismissal and refiling—negligence refiled as professional malpractice—relation back**

The trial court erred in granting defendant Ruff's motion to dismiss a professional malpractice claim on statute of limitations grounds where there had been a voluntary dismissal of a first complaint. The professional malpractice claim in the second complaint related back under N.C.G.S. § 1A-1, Rule 41(a)(1) to the filing of the negligence claim in the first complaint.

Appeal by plaintiff from orders entered 26 August 2010 by Judge Timothy S. Kincaid in Mecklenburg County Superior Court. Heard in the Court of Appeals 25 October 2012.

*Tin, Fulton, Walker & Owen, by John W. Gresham; and Vann Law Firm, P.A., by Christopher M. Vann, for plaintiff-appellant.*

*Poyner Spruill LLP, by Cynthia L. Van Horne and E. Fitzgerald Parnell, III, for Thomas C. Ruff, Jr. d/b/a Thomas C. Ruff, Jr. & Associates, defendant-appellee.*

*Ward and Smith, P.A., by Joseph A. Schouten and Lance P. Martin, for First Citizens Bank & Trust Company, defendant-appellee.*

**WILLIAMS v. LYNCH**

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GEER, Judge.

Plaintiff Mildred Williams contends on appeal that the trial court erred in dismissing on statute of limitations grounds her claims against defendants Thomas C. Ruff, Jr. d/b/a Thomas C. Ruff, Jr. & Associates and First Citizens Bank & Trust Company. In this case, Ms. Williams voluntarily dismissed an initial complaint without prejudice pursuant to Rule 41 of the Rules of Civil Procedure and then filed a second complaint against the same defendants. With respect to Mr. Ruff and First Citizens, the claims for relief in the second complaint were not identical with those in the first complaint. Although Ms. Williams contends the causes of action in her second complaint were timely under Rule 41 because they arose out of the same facts and transactions as her first complaint, binding precedent requires that we look only at whether the claims in the second complaint were included in the first complaint.

Because none of the claims brought against First Citizens in the second complaint were included in the first complaint, we affirm the trial court's order granting First Citizen's motion to dismiss. As for Mr. Ruff, however, the negligence claim for relief in the first complaint is substantively the same as the claim entitled "Professional Malpractice" asserted in the second complaint. The malpractice claim is, therefore, timely under Rule 41. Consequently, we affirm in part and reverse in part.

**Facts**

On 5 April 2007, Ms. Williams filed a complaint alleging the following facts. On or about 7 April 2004, defendant Shondu Lamar Lynch contacted Ms. Williams, who lived in Florida, representing himself to be a Realtor. He requested that she retain him as her listing agent for a piece of property she owned in Charlotte, North Carolina.

Instead, however, of giving Ms. Williams a standard listing agreement to sign, Mr. Lynch had Ms. Williams sign a limited power of attorney authorizing Mr. Lynch to act as her attorney-in-fact. The text of the power of attorney provided:

I do empower the said SHONDU LYNCH, as my attorney-in-fact to act for me and in my name, place, and stead to sign any documents and otherwise deal with any and all real property or any interest in any of the same which I may now or hereafter own, and especially to execute all necessary documents in order to convey

**WILLIAMS v. LYNCH**

[225 N.C. App. 522 (2013)]

good and marketable title to such property, and to do any act or thing and enter into any such transaction as he may see fit and in his discretion find to be for my best interest to facilitate such sale; and I do further empower my said attorney-in-fact with full power and authority to do any and every act for me, and in my name, that I could do personally present and under no disability relating to such sale.

The power of attorney was “limited to the particular property located in Mecklenburg County, North Carolina.”

Ms. Williams executed the power of attorney in Florida on 7 April 2004. On the next day, 8 April 2004, the power of attorney was filed with the Mecklenburg County Register of Deeds. On that same day, Mr. Lynch, acting without Ms. Williams’ knowledge, sold her property to Gary L. Boger, Jr. and Maryam R. Zeledon. The closing was performed at the offices of Thomas R. Ruff and Associates. Mr. Lynch executed the deed in Ms. Williams’ name.

The check for the proceeds of the sale, in the amount of \$135,597.03, was made payable to Ms. Williams and delivered to Mr. Lynch. Mr. Lynch took the check to a branch of First Citizens and attempted to negotiate the check. When First Citizens refused to negotiate the check, Mr. Lynch returned to Mr. Ruff’s office and gave Mr. Ruff an additional “notarized” document that purported to give Mr. Ruff the authority with respect to the sale of the Charlotte property “to make proceeds from closing payable to” Shondy Lynch. Ms. Williams’ and Mr. Lynch’s names were handwritten in blanks left in the typed text of the document. A signature appeared above a line labeled “NOTARY” followed by a notary stamp. Upon receiving this document, Mr. Ruff or one of his associates typed the words “Shondy Lynch for” above Ms. Williams’ name, which had originally been typed in as the payee on the check.

Mr. Lynch returned, on 9 April 2004, to First Citizens with the modified check. He was allowed to cash the check without endorsing it. Mr. Lynch used the funds from that check to purchase three cashier’s checks: one in the amount of \$7,000.00 payable to defendant Tyisha Stafford; one payable to Ms. Williams in the amount of \$70,000.00; and one payable to Mr. Lynch in the amount of \$53,597.03. Mr. Lynch received the remaining \$5,000.00 from the check in cash.

**WILLIAMS v. LYNCH**

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On 13 April 2004, Mr. Lynch returned to First Citizens and had the cashier's check originally issued to Ms. Williams reissued to him. Ms. Williams received no proceeds from the sale of her property.

Based upon these facts, Ms. Williams sued Mr. Lynch, Ms. Stafford, First Citizens, "Thomas C. Ruff, Jr., d/b/a Thomas C. Ruff, Jr., & Associates," Mr. Boger, and Ms. Zeledon. With respect to First Citizens, this initial complaint alleged claims for negligence and unfair and deceptive trade practices. The complaint asserted only a claim of negligence against Mr. Ruff.

Ms. Williams voluntarily dismissed that complaint without prejudice on 5 May 2009. On that same day, however, Ms. Williams filed a new complaint against the same defendants, omitting only Mr. Boger and Ms. Zeledon, the purchasers of Ms. Williams' property. The second complaint alleged essentially the same facts as the first complaint although it specifically alleged that Mr. Ruff instructed his secretary to type the words "Shondu Lynch for" on the check after Mr. Lynch was unable to cash the check for the closing proceeds. With respect to the claims for relief, the second complaint asserted as to First Citizens only a claim for conversion and, as to Mr. Ruff, asserted claims for breach of contract, conversion, and "Professional Malpractice."

Both Mr. Ruff and First Citizens filed motions to dismiss, contending that the claims against them in the second complaint were barred by the statute of limitations. On 26 August 2010, the trial court granted the motions and dismissed the claims against Mr. Ruff and First Citizens.

On 13 February 2012, the trial court entered judgment against Mr. Lynch and Ms. Stafford. The judgment found that Mr. Lynch was then a federal prisoner in the Mecklenburg County jail and was in default. As for Ms. Stafford, the court found that she had filed an answer admitting that she received the cashier's check as alleged in the complaint and had cashed the check. Based on those findings, the court entered judgment against Mr. Lynch in the amount of \$135,597.03 and against Ms. Stafford in the amount of \$7,000.00. Plaintiff timely appealed to this Court.

Discussion

[1] Ms. Williams contends that the trial court erred in dismissing her claims against Mr. Ruff and First Citizens based on the statute of limitations. In arguing that the claims in her refiled lawsuit were timely, Ms. Williams relies upon Rule 41(a)(1) of the Rules of Civil Procedure,

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which provides: "If an action commenced within the time prescribed therefor, or any claim therein, is dismissed without prejudice under this subsection, a new action based on the same claim may be commenced within one year after such dismissal unless a stipulation filed under (ii) of this subsection shall specify a shorter time." As this Court explained in *Losing v. Food Lion, L.L.C.*, 185 N.C. App. 278, 283, 648 S.E.2d 261, 264-65 (2007), "[u]nder North Carolina law, a plaintiff may refile within one year a lawsuit that was previously voluntarily dismissed, and the refiled case will relate back to the original filing for purposes of tolling the statute of limitations."

Mr. Ruff and First Citizens contend, however, that Rule 41's relation-back provision does not apply because the causes of action in Ms. Williams' second complaint were not included in the first complaint. In *Losing*, the plaintiff had, after voluntarily dismissing his first complaint, filed a second complaint, which included an invasion of privacy claim that had not been part of the first lawsuit. 185 N.C. App. at 284, 648 S.E.2d at 265. In holding that the statute of limitations barred the invasion of privacy claim notwithstanding Rule 41, this Court explained: "[T]he 'relate back' doctrine applies only to 'a new action based on the *same claim* . . . commenced within one year[.]' N.C. Gen. Stat. § 1A-1, Rule 41(a)(1). This Court has long held that the Rule 41(a) tolling of the applicable statute of limitations applies only to the claims in the original complaint, and not to other causes of action that may arise out of the same set of operative facts." *Losing*, 185 N.C. App. at 284, 648 S.E.2d at 265.

Similarly, in *Staley v. Lingerfelt*, 134 N.C. App. 294, 296, 517 S.E.2d 392, 394 (1999), the plaintiffs' initial complaint alleged only a 42 U.S.C. § 1983 claim and a loss of consortium claim. After voluntarily dismissing the action, the plaintiffs refiled their lawsuit, asserting not only the § 1983 claim, but also other state law claims. *Id.* This Court held that the statute of limitations barred the newly-added state law claims, reasoning: "Although the claims arise from the same events as the section 1983 and loss of consortium claims, the defendants were not placed on notice that they would be asked to defend these claims within the time required by the statute of limitations." *Id.* at 299, 517 S.E.2d at 396.

Under the holdings of *Losing* and *Staley*, the relation-back provision in Rule 41(a)(1) only applies to those claims in the second complaint that were included in the voluntarily-dismissed first complaint. Here, the breach of contract and conversion claims asserted against Mr. Ruff and the conversion claim asserted against First Citizens



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were not included in Ms. Williams' first complaint. Since those claims appeared for the first time in the second complaint, the trial court properly dismissed them as barred by the statute of limitations.

Ms. Williams argues, however, that *Losing* and *Staley* misapply the Court's holding in *Stanford v. Owens*, 76 N.C. App. 284, 289, 332 S.E.2d 730, 733 (1985). In *Stanford*, upon which *Staley* and *Losing* relied, the Court considered whether a second complaint alleging a fraud claim properly related back to the first voluntarily dismissed complaint that had alleged a negligent misrepresentation claim but not a fraud claim. *Id.* at 288-89, 332 S.E.2d at 733. This Court concluded that the fraud claim was barred by the statute of limitations, explaining:

While, under the circumstances of this case, Rule 41(a)(1) does prevent the negligent misrepresentation claim from being barred by the statute of limitations, nothing in the rule, as we read it, exempts plaintiffs' fraud claim, filed for the first time seven years after it accrued, from the fatal effects of the three-year statute of limitations. Plaintiffs' contention that the fraud claim has in effect been before the court all along, since it rests upon somewhat the same allegations that were made in support of the negligent misrepresentation claim when the action was first filed, though appealing to some extent is nevertheless unavailing. A claim for relief based on fraud is unique, and must be pleaded with particularity even under our liberal rules of notice pleading. A claim for fraud is fundamentally different from a claim for negligence and in alleging in the first action that defendants had negligently misrepresented the condition of the land plaintiffs did not in effect or otherwise also allege that defendants had defrauded them.

*Id.* at 289, 332 S.E.2d at 733 (internal citations omitted).

Although Ms. Williams suggests that *Stanford's* holding should be read more narrowly than this Court did in *Losing* and *Staley* and limited to claims with different pleading requirements, *Losing* and *Staley* are not inconsistent with *Stanford*. Their application of *Stanford*—even if viewed as an extension of the law—is binding on subsequent panels. *In re Civil Penalty*, 324 N.C. 373, 384, 379 S.E.2d 30, 37 (1989) (“Where a panel of the Court of Appeals has decided the same issue, albeit in a different case, a subsequent panel of the same

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court is bound by that precedent, unless it has been overturned by a higher court.”).

Additionally, Ms. Williams points to *Richardson v. McCracken Enters.*, 126 N.C. App. 506, 509, 485 S.E.2d 844, 846 (1997), *aff’d per curiam*, 347 N.C. 660, 496 S.E.2d 380 (1998), and *Centura Bank v. Winters*, 159 N.C. App. 456, 459, 583 S.E.2d 723, 725 (2003), as supporting her contention that for purposes of Rule 41, the word “claim” means arising out of the same transaction or occurrence. Those decisions did not, however, address Rule 41(a)(1)’s relation-back provision. Instead, those cases dealt with Rule 41(a)(1)’s mandate that “a notice of dismissal operates as an adjudication upon the merits when filed by a plaintiff who has once dismissed in any court of this or any other state or of the United States, an action based on or including the same claim.” That aspect of Rule 41(a)(1) involves different considerations than the provision at issue in this case. Because *Losing* and *Staley* address and construe the precise language of Rule 41(a)(1) involved here, those opinions—and not *Richardson* or *Centura Bank*—are controlling. We, therefore, affirm the trial court’s order to the extent that it dismissed the conversion claim against First Citizens and the breach of contract and conversion claims against Mr. Ruff.

[2] We reach a different conclusion, however, with respect to the claim against Mr. Ruff labeled “Professional Malpractice.” Ms. Williams’ first complaint asserted a claim for negligence based on Mr. Ruff’s actions as the closing attorney, which enabled Mr. Lynch to cash the closing check with the result that Ms. Williams received none of the proceeds of the sale of her property. Thus, that negligence claim asserted negligence arising out Mr. Ruff’s role as the closing attorney. In the second complaint, Ms. Williams relabeled her negligence claim as a “Professional Malpractice” claim and alleged that Mr. Ruff’s “transferring Plaintiff’s funds to Defendant Lynch without first obtaining Plaintiff’s approval . . . breached the duty of care owed by North Carolina attorneys in real estate transactions to their clients.” Since the second complaint also alleged that Mr. Ruff’s having the closing check altered was the means by which Mr. Lynch was able to receive the funds rather than Ms. Williams, the first and second complaints assert the same negligence claim against Mr. Ruff.

It is immaterial that the first complaint identified the claim as a negligence claim and the second complaint identified the claim as a professional malpractice claim. When, as the first complaint alleged,

**WILLIAMS v. LYNCH**

[225 N.C. App. 522 (2013)]

the negligence arose out of Mr. Ruff's professional role, the two types of claims are synonymous. As this Court has observed, "claims 'arising out of the performance of or failure to perform professional services' based on negligence or breach of contract are in the nature of 'malpractice' claims." *Sharp v. Teague*, 113 N.C. App. 589, 592, 439 S.E.2d 792, 794 (1994) (quoting N.C. Gen. Stat. § 1-15(c) (1983) and holding that fraud does not constitute "professional malpractice" for purposes of N.C. Gen. Stat. § 1-15(c)'s statutes of limitation and repose). *See also Webster v. Powell*, 98 N.C. App. 432, 440, 391 S.E.2d 204, 208 (1990) ("A professional negligence claim against an attorney is, in essence, a legal malpractice claim."), *aff'd per curiam*, 328 N.C. 88, 399 S.E.2d 113 (1991).

We, therefore, hold that the "Professional Malpractice" claim in the second complaint related back under Rule 41(a)(1) to the filing of the negligence claim in the first complaint. Since there is no dispute that the first complaint was timely filed, the trial court erred in granting Mr. Ruff's motion to dismiss on statute of limitations grounds as to the "Professional Malpractice" claim. Consequently, we reverse and remand to the trial court for further proceedings on that claim.

Affirmed in part; reversed and remanded in part.

Judges STEPHENS and McCULLOUGH concur.

## CASES REPORTED WITHOUT PUBLISHED OPINIONS

(FILED 5 FEBRUARY 2013)

BECK v. BECK No. 12-685	New Hanover (04CVD2333)	Affirmed
BURTON v. ARVINMERITOR, INC. No. 12-320	Indust. Comm. (797214)	Affirmed
ESTATE OF BRITTANY BRIDGES v. NC FARM BUREAU MUT. INS. CO., INC. No. 12-567	Gaston (11CVS2098)	Affirmed
ESTATE OF MATTHEW BRIDGES v. N.C. FARM BUREAU MUT. INS. CO., INC. No. 12-566	Gaston (11CVS2130)	Affirmed
FARLEY v. FARLEY No. 12-377	Guilford (07CVD4058)	Dismissed
FRAGALE v. HUTCHINSON No. 12-953	Mecklenburg (11CVS21971)	Affirmed
HAIRSTON v. COLLINS No. 12-1016	Forsyth (11CVS851)	Vacated and Remanded
HAUGHTON v. HSBC BANKS USA No. 12-420	Mecklenburg (11CVS14434)	Affirmed in part; dismissed in part
HOLLOWAY v. CV INDUS., INC. No. 12-868	Indust. Comm. (574777)	Affirmed in part, remanded in part
IN RE F.L.C. No. 12-718	Ashe (10JT24) (10JT25)	Affirmed
IN RE J.E. No. 12-978	Columbus (01JT4)	Affirmed
IN RE J.Z.B. No. 12-727	New Hanover (10JT106-108)	Affirmed
IN RE K.M.N. No. 12-762	Burke (10J7-8)	Affirmed
IN RE S.D. No. 12-1052	Bertie (11JB25)	Remanded; new dispositional hearing

IN RE S.S. No. 12-896	Anson (10J21-26)	Vacated and Remanded
KELLY v. REALTY WORLD CAPE FEAR No. 12-822	New Hanover (11CVS4535)	Affirmed
KOPF v. SMARTFLOW TECHNOLOGIES, INC. No. 12-612	Wake (10CVS5596) (10CVS5644)	Affirmed
LASSITER v. TOWN OF SELMA No. 12-845	Indust. Comm. (589062)	Remanded
LAWYERS PARALEGAL TRAINING PROGRAMS, LLC v. GUILFORD COLL. No. 12-805	Forsyth (11CVS1292)	Affirmed
NATIONWIDE PROP. & CAS. INS. CO. v. BRINLEY'S GRADING SERV., INC. No. 12-276	Wake (10CVS5673)	Affirmed in part, reversed and remanded in part
OTTO v. CERTO No. 12-1028	Madison (08CVD353)	Affirmed
SADLER v. SCOTT LOWERY LAW OFFICE, P.C. No. 12-825	Cumberland (11CVD4272)	Affirmed
STATE v. LINDSEY No. 11-612-2	Caldwell (09CRS50280)	No error in part, reversed in part
STATE v. BROWN No. 12-848	Mecklenburg (11CRS44369-71)	Dismissed in Part, Remanded for Resentencing
STATE v. CAVINESS No. 12-643	Randolph (08CRS196)	No Error
STATE v. DUNLAP No. 12-657	Caldwell (08CRS51335) (08CRS51353)	No Prejudicial Error

STATE v. JONES No. 12-385	Cumberland (09CRS55646) (09CRS57521-22) (09CRS58828) (09CRS58831) (09CRS58833-38) (09CRS59364-65) (09CRS59664-69) (09CRS63966) (10CRS52106)	Affirmed
STATE v. McNEELY No. 12-579	Forsyth (09CRS33833) (09CRS53882) (10CRS24411)	Reversed in Part and Remanded
STATE v. MEMIJE No. 12-263	Forsyth (11CRS2875) (11CRS52342)	No Error
STATE v. MOORE No. 12-365	Alamance (10CRS55284) (10CRS7447)	No Error
STATE v. MORETTI No. 12-468	Cumberland (08CRS53021)	No Error
STATE v. MUHAMMAD No. 12-963	Wake (10CRS226189)	No prejudicial error
STATE v. PARKS No. 12-608	Wilkes (10CRS53630)	No Error
STATE v. RANKINS No. 12-620	Hertford (10CRS50153-54)	Affirmed
STATE v. RENDLEMAN No. 12-463	Catawba (10CRS51873)	No Error
STATE v. SNIPES No. 12-542	Chatham (08CRS3787) (08CRS50722)	No Error
STATE v. WARD No. 12-295	Lenoir (07CRS54098) (10CRS1180) (10CRS1728-29)	Dismissed in part; affirmed in part

STATE v. WILLIS  
No. 12-689

Mecklenburg  
(10CRS204072-75)

No prejudicial error  
in part; judgment  
arrested on first-  
degree kidnapping  
under Rule  
No. 10 CRS 204074;  
remanded for  
sentencing on  
second-degree  
kidnapping

STATE v. WILSON  
No. 12-819

Buncombe  
(11CRS408)  
(11CRS55583-84)

No Error

WRIGHT v. WAL-MART,  
INC. #1127  
No. 12-592

Indust. Comm.  
(W66377)

Affirmed in part;  
reversed in part  
and remanded

**IN RE A.P.W.**

[225 N.C. App. 534 (2013)]

IN THE MATTER OF A.P.W., A.K.W., N.R.W.

No. COA12-807

Filed 19 February 2013

**1. Appeal and Error—termination of parental rights—appeal properly taken**

Respondent-mother properly and timely appealed from an order terminating her parental rights and therefore had the right to appeal the order changing the permanency planning order to adoption. Her notice of appeal correctly identified the orders from which appeal was taken, correctly identified the court to which appeal was taken, was properly signed by both respondent-mother and counsel, was properly served upon all parties, and was timely.

**2. Appeal and Error—termination of parental rights—permanency planning order change—implicit cessation of reunification**

Respondent-mother had the right to appeal orders terminating her parental rights and changing the permanency planning order to adoption where DSS argued that the order did not contain a finding ceasing reunification efforts, as required by statute. The trial court's order implicitly ceased reunification efforts.

**3. Termination of Parental Rights—findings for ceasing reunification efforts—required**

The trial court erred when changing a permanency planning order to adoption and terminating parental rights by not making the statutorily required findings for ceasing reunification efforts between respondent and her children. Although the order detailed respondent-mother's case history and her failure to complete her case plan, it did not contain any of the findings required by N.C.G.S. § 7B-507(b) and was remanded.

Appeal by respondent-mother from orders entered 21 June 2011 by Judge Margaret L. Sharpe and 2 April 2012 by Judge Angela Foster in Guilford County District Court. Heard in the Court of Appeals 29 January 2013.



## IN RE A.P.W.

[225 N.C. App. 534 (2013)]

*Mercedes O. Chut for Guilford County Department of Social Services.*

*W. Michael Spivey for respondent-appellant mother.*

*Smith, James, Rowlett & Cohen, L.L.P., by Margaret Rowlett, for guardian ad litem.*

HUNTER, ROBERT C., Judge.

Respondent-mother appeals from the trial court's 2 April 2012 order terminating her parental rights to A.P.W., A.K.W., and N.R.W. (the "juveniles"), as well as the trial court's 21 June 2011 permanency planning order which implicitly ceased reunification efforts with the juveniles. Because the trial court made insufficient findings of fact to support its order ceasing reunification efforts, we reverse both the order ceasing reunification efforts and the order terminating respondent-mother's parental rights, and we remand the case for further proceedings consistent with this opinion.

On 1 April 2010, the Guilford County Department of Social Services ("DSS") filed a petition alleging that the juveniles were neglected and dependent, based on the family's homelessness, domestic violence between the parents, and the parents' untreated mental illnesses. DSS was given nonsecure custody of the juveniles. In an order entered on 18 June 2010, the trial court adjudicated the juveniles dependent. In the disposition portion of the order, the trial court maintained custody with DSS and ordered the parents to comply with their case plans, which were entered into on 22 April 2010.

The matter came on for a permanency planning hearing on 18 May 2011. In a corresponding order entered 21 June 2011, the trial court changed the permanent plan from reunification to adoption and ordered DSS to proceed with the filing of a petition to terminate the parents' parental rights. At the hearing, respondent-mother reserved her right to appeal from the order.

On 27 June 2011, DSS filed a petition to terminate respondent-mother's parental rights to the children, based on the following grounds: (1) neglect; (2) willfully leaving the juveniles in foster care for more than twelve months without showing reasonable progress in correcting the conditions that led to removal; (3) willful failure to pay a reasonable portion of the cost of care for the juveniles; and (4) willful abandonment. *See* N.C. Gen. Stat. § 7B-1111(a)(1)-(3), (7) (2011).

## IN RE A.P.W.

[225 N.C. App. 534 (2013)]

Following a hearing, the trial court entered an order on 2 April 2012 in which it found the existence of the following grounds for termination against respondent-mother: (1) neglect; (2) willfully leaving the juveniles in foster care for more than twelve months without showing reasonable progress in correcting the conditions that led to removal; and (3) willful failure to pay a reasonable portion of the cost of care for the juveniles.<sup>1</sup> The trial court also concluded that termination of respondent-mother's parental rights was in the juveniles' best interests. The trial court dismissed the willful abandonment claim against respondent-mother. Respondent-mother timely appealed from the order, along with the 21 June 2011 permanency planning order.

Respondent-mother's sole argument on appeal is that the trial court erred in changing the permanent plan to adoption and effectively ceasing reunification efforts without making findings of fact required by N.C. Gen. Stat. § 7B-507(b)(1).

**[1]** As a preliminary matter, both DSS and the guardian ad litem ("GAL") argue that respondent-mother's appeal should be dismissed. First, we address the GAL's argument. The GAL contends that respondent-mother has no right to appeal from the permanency planning order because the order terminating her parental rights was not properly appealed. The statute governing respondent-mother's appeal provides the following:

(a) In a juvenile matter under this Subchapter, appeal of a final order of the court in a juvenile matter shall be made directly to the Court of Appeals. Only the following juvenile matters may be appealed:

. . . .

(5) An order entered under G.S. 7B-507(c) with rights to appeal properly preserved as provided in that subsection, as follows:

- a. The Court of Appeals shall review the order to cease reunification together with an appeal of the termination of parental rights order if all of the following apply:

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1. The trial court also terminated the parental rights of the father of N.R.W. and A.K.W., but he is not a party to this appeal. The trial court noted that the father of A.P.W. had relinquished his parental rights and that the time for revocation of his relinquishment had expired.

## IN RE A.P.W.

[225 N.C. App. 534 (2013)]

1. A motion or petition to terminate the parent's rights is heard and granted.
2. The order terminating parental rights is appealed in a proper and timely manner.
3. The order to cease reunification is identified as an issue in the record on appeal of the termination of parental rights.

N.C. Gen. Stat. § 7B-1001(a)(5)(a)(1)–(3) (2011). The GAL argues that respondent-mother's appeal from the order terminating parental rights was not proper because respondent-mother did not bring forward any issues on appeal related to the termination order. Therefore, the GAL argues, respondent-mother's appeal fails to comply with N.C. Gen. Stat. § 7B-1001(a)(5)(a)(2) and is subject to dismissal. We disagree.

The statutory subsection cited to by the GAL states that “[t]he order terminating parental rights is appealed in a *proper and timely manner*.” N.C. Gen. Stat. § 7B-1001(a)(5)(a)(2) (emphasis added). Under our juvenile code, N.C. Gen. Stat. § 7B-1001 and N.C.R. App. P. 3.1 govern how and when appeal is taken in such cases. In the instant case, respondent-mother's notice of appeal correctly identifies the orders from which appeal was taken, it correctly identifies the court to which appeal was taken, it was properly signed by both respondent-mother and counsel, and it was properly served upon all other parties. Additionally, respondent-mother's notice of appeal was filed within the time constraints contained in N.C. Gen. Stat. § 7B-1001(b). Therefore, we find that respondent-mother properly and timely appealed from the order terminating her parental rights, and we conclude that respondent-mother's appeal complies with N.C. Gen. Stat. § 7B-1001(a)(5)(a)(2). Accordingly, we reject the GAL's argument.

**[2]** Next, we turn to DSS's argument for dismissal. DSS disputes respondent-mother's claim that the 21 June 2011 permanency planning order ceased reunification efforts. DSS argues that because the order did not contain a finding ceasing reunification efforts, respondent-mother does not have a right to appeal the order pursuant to N.C. Gen. Stat. § 7B-1001(a)(5). Respondent-mother argues that the order, while not explicitly ceasing reunification efforts, implicitly did so by changing the permanent plan to adoption and ordering the filing of a petition to terminate parental rights. We agree with respondent-mother.

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[225 N.C. App. 534 (2013)]

When a trial court enters “[a]n order placing or continuing the placement of a juvenile in the custody or placement responsibility of a county department of social services,” the court’s order is required to, *inter alia*, “contain findings as to whether a county department of social services should continue to make reasonable efforts to prevent or eliminate the need for placement of the juvenile, unless the court has previously determined or determines under subsection (b) of this section that such efforts are not required or shall cease[.]” N.C. Gen. Stat. 7B-507(a)(3) (2011).

In the instant case, the trial court found that custody of the juveniles should remain with DSS, concluded that the permanent plan for the children should be changed from reunification to adoption, and ordered DSS to proceed with filing a petition to terminate the parental rights of the parents. However, since the court ordered custody to remain with DSS, it was required by N.C. Gen. Stat. § 7B-507(a) to either find that reasonable efforts at reunification should continue or make additional findings required by N.C. Gen. Stat. § 7B-507(b) that reasonable reunification efforts should cease. It did neither.

However, contrary to DSS’s assertion, the lack of a finding regarding cessation of reunification efforts does not warrant dismissal. In *In re J.N.S.*, 207 N.C. App. 670, 681, 704 S.E.2d 511, 518 (2010), we held that where a trial court failed to make any findings regarding reasonable efforts at reunification, the “trial court’s directive to DSS to file a petition to terminate [a parent’s] parental rights implicitly also directed DSS to cease reasonable efforts at reunification.” We explained:

Although the trial court failed to make any findings regarding reasonable efforts at reunification, the language of the disposition order indicates that the trial court effectively determined that reunification efforts between respondent-mother and the minor children should cease when it ordered DSS to file a petition to terminate respondent-mother’s parental rights. As our Supreme Court has stated, “[t]he cessation of reunification efforts is a natural and appropriate result of a court’s order initiating a termination of parental rights.” The *Brake* Court stressed that

[i]t would be a vain effort, at best, for a court to enter an order that had the effect of directing DSS to undertake to terminate the family unit while at

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[225 N.C. App. 534 (2013)]

the same time ordering that it continue its efforts to reunite the family. In fact, *such an order would tend to be both internally inconsistent and self-contradictory.*

*Id.* at 680-81, 704 S.E.2d at 518 (quoting *In re Brake*, 347 N.C. 339, 340-41, 493 S.E.2d 418, 419-20 (1997)) (internal citation omitted). As in *J.N.S.*, the trial court in the instant case directed DSS to file a petition to terminate parental rights. Moreover, the trial court here changed the permanent plan to adoption, and respondent-mother properly preserved her right to appeal the cessation of reunification efforts pursuant to N.C. Gen. Stat. § 7B-507(c). Based on the foregoing, we hold that the trial court's 21 June 2011 order implicitly ceased reunification efforts, and we reject DSS's argument for dismissal.<sup>2</sup>

[3] Therefore, we now turn to respondent-mother's argument that the trial court erred by failing to make necessary findings of fact pursuant to N.C. Gen. Stat. § 7B-507(b). We agree with respondent-mother. In order to cease reunification efforts with a parent, the trial court must comply with section 7B-507(b), which provides the following, in pertinent part:

In any order placing a juvenile in the custody or placement responsibility of a county department of social services, whether an order for continued non-secure custody, a dispositional order, or a review order, the court may direct that reasonable efforts to eliminate the need for placement of the juvenile shall not be required or shall cease if the court makes written findings of fact that:

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2. We note that the trial court held a subsequent permanency planning hearing on 7 December 2011, and entered a corresponding order on 30 December 2011. The 30 December 2011 order also failed to contain a finding regarding the cessation of reunification efforts. In the 30 December 2011 order, the trial court indicated that "[o]n October 5, 2011, the [c]ourt stayed the termination of parental rights hearing to allow the mother an opportunity to demonstrate her ability to consistently work her case plan and she has failed to do so." The trial court also found that DSS had made reasonable efforts toward reunification since the last hearing. At first blush, these findings might appear to lend support to DSS's argument that the trial court did not cease reunification efforts in the 21 June 2011 order. However, after reviewing the record as a whole, it appears that the trial court intended to cease reunification efforts in the 21 June 2011 order, but subsequently held that order in abeyance on 5 October 2011 in order to give respondent-mother another opportunity to work on her case plan. Although unusual, the trial court's actions on 5 October 2011 do not undo the trial court's cessation of reunification efforts on 21 June 2011.

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- (1) Such efforts clearly would be futile or would be inconsistent with the juvenile's health, safety, and need for a safe, permanent home within a reasonable period of time[.]

N.C. Gen. Stat. § 7B-507(b) (2011). We have held that N.C. Gen. Stat. § 7B-507(b)(1) requires the trial court to “ultimately find . . . that: (1) attempted reunification efforts would be futile, or (2) reunification would be inconsistent with the juvenile’s health, safety, and need for a safe, permanent home within a reasonable period of time.” *In re I.R.C.*, \_\_\_ N.C. App. \_\_\_, \_\_\_, 714 S.E.2d 495, 498 (2011). In *I.R.C.*, we reversed and remanded the trial court’s order ceasing reunification efforts where it failed to make the ultimate finding required by N.C. Gen. Stat. § 7B-507(b). *Id.* at \_\_\_, 714 S.E.2d at 499; *see J.N.S.*, 207 N.C. App. at 682, 704 S.E.2d at 519. Here, the trial court’s order details respondent-mother’s case history and her failure to complete her case plan, but it does not contain any of the findings required by statute.<sup>3</sup> Therefore, we must reverse the trial court’s 21 June 2011 permanency planning order, which implicitly ceased reunification efforts, and the subsequent order terminating respondent-mother’s parental rights and remand this case to the trial court for further proceedings. We reiterate to the trial court that an order ceasing reunification efforts must contain the ultimate findings mandated by N.C. Gen. Stat. § 7B-507(b).

Reversed and remanded.

Judges McCULLOUGH and DAVIS concur.

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3. We again note the trial court’s subsequent permanency planning order, entered on 30 December 2011, also failed to contain the requisite findings pursuant to N.C. Gen. Stat. § 7B-507(b)(1).

## IN RE B.S.O.

[225 N.C. App. 541 (2013)]

IN THE MATTER OF B.S.O., V.S.O., R.S.O., A.S.O., Y.S.O.

No. COA12-878

Filed 19 February 2013

**Termination of Parental Rights—denial of motion for review—  
misapprehension preventing court from exercising discretion**

The trial court abused its discretion by denying respondent mother's motion for review based on the court's mistaken belief that it had entered an order terminating parental rights at the conclusion of the termination hearing. The court's denial of the motion to re-open the evidence was based on a misapprehension that prevented the court from properly exercising its discretion.

Appeal by Respondent-parents from order entered 18 April 2012 by Judge Regan A. Miller in Mecklenburg County District Court. Heard in the Court of Appeals 31 January 2013.

*Senior Associate Attorney Twyla Hollingsworth-Richardson for Petitioner Mecklenburg County Department of Social Services, Youth and Family Services.*

*Assistant Appellate Defender Joyce L. Terres for Respondent-mother.*

*Rebekah W. Davis for Respondent-father.*

*Smith Moore Leatherwood LLP, by Carrie A. Hanger, for Guardian ad Litem.*

STEPHENS, Judge.

*Procedural History*

This appeal arises from the trial court's termination of Respondents' parental rights. Respondent-mother is the biological mother of all five children. Respondent-father A.S. is the biological father of B.S.O., V.S.O., and R.S.O. The fathers of the other children are not parties to this appeal. Petitioner Mecklenburg County Department of Social Services, Youth and Family Services ("YFS") first became involved with the family in February of 2006 based on reports of inappropriate discipline and domestic violence. YFS remained involved with the family over the course of the next several years. On 9 May 2011, YFS filed petitions to terminate Respondent-

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mother's parental rights to all five minor children, and Respondent-father A.S.'s parental rights to his three biological children.

The termination hearing began on 5 January 2012 and concluded on 16 March 2012.<sup>1</sup> At the conclusion of the hearing, the trial court orally recounted the case history and then stated:

Well, no, the evidence does establish that it would be in the best interest to terminate parental rights, so but we'll—Just go ahead and draft that [YFS attorney], and I'll take this under advisement and continue to consider it and see exactly what the result's going to be. But the Department will have to continue her visitation with the children until I order otherwise, and reasonable efforts.

On 12 April 2012, Respondent-mother filed a "Motion for Review," in which she alleged that new facts had arisen that impacted both the grounds for termination and the best interests of the juveniles. Specifically, the motion stated that Respondent-father, who had been deported and had not attended the prior hearings, had returned to the United States and attended the last two visits with the juveniles.

At a hearing on 17 April 2012, the trial court orally denied the motion, stating that it had "essentially made a ruling based on the evidence that was presented" at the termination hearing and thus it would be "inappropriate" to re-open the evidence. In its 18 April 2012 written order denying the motion, the trial court again found it had "made a ruling on the evidence presented at the time of the termination of parental rights ("TPR") trial" and "[o]nce an order is entered the rights of the respondent parents are terminated pursuant to [N.C. Gen. Stat. § 7B-1112 (2011)]." On the same date, the court entered its written order terminating Respondents' parental rights. Respondent-mother appeals from both the TPR order and the order denying her "Motion for Review." Respondent-father appeals from the TPR order.

*Discussion*

On appeal, Respondents each argue that the trial court (1) abused its discretion by denying Respondent-mother's motion for review seeking to re-open the evidence, (2) erred in finding grounds for termination, and (3) erred in concluding that termination of their parental rights was in the juveniles' best interests. We reverse and remand.

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1. A permanency planning hearing was held on 15 March 2012.



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Respondents first contend the trial court abused its discretion by denying the motion for review, because it mistakenly believed it had entered an order terminating parental rights at the conclusion of the termination hearing. We agree.

A trial court has the discretion to “re-open the case and admit additional testimony after the conclusion of the evidence and even after argument of counsel.” *Miller v. Greenwood*, 218 N.C. 146, 150, 10 S.E.2d 708, 710 (1940) (citations omitted). A trial court may even re-open the evidence weeks after holding the original hearing, *Wade v. Wade*, 72 N.C. App. 372, 384, 325 S.E.2d 260, 270-71, *disc. review denied*, 313 N.C. 612, 330 S.E.2d 616 (1985), or, “[w]hen the ends of justice require[,] even after the jury has retired.”<sup>2</sup> *Miller*, 218 N.C. at 150, 10 S.E.2d at 710-11 (citation omitted).

It is well established that where matters are left to the discretion of the trial court, appellate review is limited to a determination of whether there was a clear abuse of discretion. A trial court may be reversed for abuse of discretion only upon a showing that its actions are manifestly unsupported by reason. A ruling committed to a trial court’s discretion is to be accorded great deference and will be upset only upon a showing that it was so arbitrary that it could not have been the result of a reasoned decision.

*White v. White*, 312 N.C. 770, 777, 324 S.E.2d 829, 833 (1985) (citations omitted). Further, “[w]hen the exercise of a discretionary power of the court is refused on the ground that the matter is not one in which the court is permitted to act, the ruling of the court is reviewable.” *State v. Ford*, 297 N.C. 28, 30-31, 252 S.E.2d 717, 718 (1979). “Where a trial court, under a misapprehension of the law, has failed to exercise its discretion regarding a discretionary matter, that failure amounts to error which requires reversal and remand.” *Robinson v. General Mills Rest.*, 110 N.C. App. 633, 637, 430 S.E.2d 696, 699 (1993) (citation omitted).

Here, its statements in open court and in the TPR order make clear that the trial court denied Respondent-mother’s motion to re-open the evidence on the basis that it had already entered an order terminating Respondents’ parental rights before the motion was filed. Accordingly, we must determine whether the court entered a termi-

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2. Although the proceeding here was not a jury trial, this point is mentioned to emphasize the expansive time frame for which additional evidence may be received.

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nation order at the conclusion of the termination hearing. After careful review, we conclude that it did not.

“An order terminating the parental rights completely and permanently terminates all rights and obligations of the parent to the juvenile and of the juvenile to the parent arising from the parental relationship[.]” N.C. Gen. Stat. § 7B-1112 (2011). In a proceeding to terminate parental rights, the trial court first “shall take evidence, find the facts, and shall adjudicate the existence or nonexistence of any of the circumstances set forth in G.S. 7B-1111 which authorize the termination of parental rights of the respondent.” N.C. Gen. Stat. § 7B-1109(e) (2011). The second step of the process, “[a]fter an adjudication that one or more grounds for terminating a parent’s rights exist[.]” is to determine whether termination would be in the “best interests of the juvenile[.]” N.C. Gen. Stat. § 7B-1110 (2011) (emphasis added).

Chapter 7B does not define “entry” of a termination of parental rights order, but does require that both adjudicatory and best interest orders in termination matters be “reduced to writing, signed, and *entered* no later than 30 days following the completion of the termination of parental rights hearing.” N.C. Gen. Stat. §§ 7B-1109(e),-1110(a) (2011) (emphasis added). The plain language of these statutes establishes that a TPR order must be in written form to be “entered.” *Id.* In addition, “[t]he Rules of Civil Procedure will . . . apply to fill procedural gaps where Chapter 7B requires, but does not identify, a specific procedure to be used in termination cases.” *In re B.L.H.*, 190 N.C. App. 142, 146, 660 S.E.2d 255, 257 (citations omitted), *affirmed per curiam*, 362 N.C. 674, 669 S.E.2d 320 (2008). The Rules of Civil Procedure specifically provide that “a judgment is *entered* when it is reduced to writing, signed by the judge, and filed with the clerk of court.” N.C.R. Civ. P. 58 (emphasis added).

Further, section (a)(1) of Rule 52 of the North Carolina Rules of Civil Procedure provides: “ ‘In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon and direct the entry of the appropriate judgment.’ Rule 52 applies to termination of parental rights orders.” *In re T.P.*, 197 N.C. App. 723, 729, 678 S.E.2d 781, 786 (2009) (emphasis added).

Here, toward the end of the termination hearing on 16 March 2012, the trial court made a number of remarks that suggested it could find certain grounds for termination. The court also instructed

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the YFS attorney to include certain findings of fact in the “proposed order” he was told to draft. The court even appears to have started to determine that termination would be in the children’s best interests. However, the court then stopped and took the matter under advisement instead:

All right, I’m not going to dictate this, but Mr. Smith [the YFS attorney] go ahead and prepare a proposed order making the findings of fact that concern the history of this case including the prior referrals that were made with respect to the family and the lack of supervision, what the case plan in this case has been, what efforts both parents have made to complete the plan.

. . . .

Well, anyway, all right. So, as far as the Court is concerned, *I think the evidence—Well, no, the evidence does establish that it would be in the best interest to terminate parental rights, so but we’ll—Just go ahead and draft that Mr. Smith, and I’ll take this under advisement and continue to consider it and see exactly what the result’s going to be. But the Department will have to continue her visitation with the children until I order otherwise, and reasonable efforts.*<sup>3</sup>

(Emphasis added). Although the court orally summarized some of the evidence presented regarding the alleged grounds for termination, and suggested the existence of some grounds for termination, the court explicitly stated that the question of whether termination would be in the children’s best interests would be taken “under advisement and [the court would] continue to consider it and see exactly what the result[ was] going to be.” Thus, at the conclusion of the termination hearing, the trial court had plainly not yet made the best interests determination required to terminate parental rights. *See* N.C. Gen. Stat. § 7B-1110. Accordingly, the court cannot have terminated Respondent’s parental rights. That nothing had been reduced to writing or filed with the clerk of court is beside the point. Not only had the trial court failed to *enter* an order terminating parental rights,

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3. These remarks appear to have been in whole or in large part regarding Respondent-mother’s parental rights. When asked by the YFS attorney, “And as to the fathers?”, the trial court responded, “Well, the fathers, you know—I don’t know.” The court went on to make some remarks that could be construed as suggesting the presence of grounds which would justify termination, but never spoke about the children’s best interests as regards determination of the rights of any of the fathers.

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it had not even made a *ruling* on the question.<sup>4</sup> Indeed, the court ordered YFS to continue visitation and reasonable efforts toward reunification which it could not have done had Respondent-mother's parental rights been terminated.

Respondent-mother filed her motion for review on 12 April 2012. On 17 April 2012, the trial court heard and orally denied the motion. The TPR order was not entered until the following day, 18 April 2012, the same date on which the order denying Respondent-mother's motion was entered.<sup>5</sup> At the time the court orally denied Respondent-mother's motion, the court had not determined that termination was in the children's best interests, let alone (1) reduced its findings of fact, conclusions of law, and best interests determination to writing; (2) signed a written order; or (3) filed it with the clerk of court. As a result, the trial court had not entered a TPR order and had not terminated Respondents' parental rights.

We conclude the court's denial of the motion to re-open the evidence was based on a misapprehension that prevented the court from properly exercising its discretion. Accordingly, we reverse the orders terminating Respondents' parental rights and denying Respondent-mother's motion for review. We remand the matter to the trial court for proper consideration of Respondent-mother's motion. Because we reverse the TPR order, we need not address Respondents' remaining arguments.

Reversed and remanded.

Judges STROUD and DILLON concur.

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4. In *In re S.N.H.*, 177 N.C. App. 82, 89, 627 S.E.2d 510, 515 (2006), this Court held "the trial court did not err in directing petitioner's counsel to draft the termination order" based on the trial judge's clear statement "that he '[found] by clear and convincing evidence that the . . . grounds enumerated in the petition justify termination of parental rights of [respondent] to these . . . children[.]'" *Id.* at 88, 627 S.E.2d at 151. Although, as here, it is appropriate for a trial court to direct "counsel for petitioner to draft an order terminating respondent's parental rights," such directions are proper when the trial judge "enumerate[s] specific findings of fact to be included in the order." *Id.* at 89, 627 S.E.2d at 151. However, all of this assumes that the trial court has already made a termination ruling which had not yet occurred here.

5. The file stamp indicates that the TPR order was entered one minute prior to entry of the order denying Respondent-mother's motion.

## IN RE D.A.C.

[225 N.C. App. 547 (2013)]

IN THE MATTER OF D.A.C.

No. COA12-568

Filed 19 February 2013

**Juveniles—delinquency—oral admissions—custodial interrogation—Miranda warnings**

The trial court did not err by denying the juvenile defendant's motion to suppress his oral admissions to investigating officers. The juvenile was not in custody at the time that he orally admitted having fired a shot which struck the neighbor's residence, and thus, was not subjected to an impermissible custodial interrogation conducted without the provision of the warnings required by *Miranda*, 384 U.S. 436, and N.C.G.S. § 7B-2101.

Appeal by juvenile from adjudication and disposition orders entered 5 January 2012 by Judge Amanda Wilson in Stanly County District Court. Heard in the Court of Appeals 22 October 2012.

*Attorney General Roy Cooper, by Assistant Attorney General LaToya B. Powell, for the State.*

*Michelle FormyDuval Lynch, for juvenile-appellant.*

ERVIN, Judge.

Juvenile D.A.C. appeals from orders adjudicating him to be a delinquent juvenile based on a determination that he had committed the offenses of injury to personal and real property and placing him on juvenile probation subject to certain terms and conditions. On appeal, Juvenile contends that the trial court erred by denying his motion to suppress an inculpatory statement which he alleges to have been obtained as the result of a violation of his rights under *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966), and N.C. Gen. Stat. § 7B-2101. After careful consideration of Juvenile's challenges to the trial court's orders in light of the record and the applicable law, we conclude that the trial court's orders should be affirmed.

I. Factual BackgroundA. Substantive Facts

On 29 October 2011, Detective Lieutenant Scott Williams of the Stanly County Sheriff's Office, who was off duty at the time,

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[225 N.C. App. 547 (2013)]

responded to a call that gunshots had been fired into a home. Upon arriving at the location specified in the call, Lieutenant Williams determined, based upon the angle at which the bullets had entered the home, that the shots had originated from the house across the street. After Detective Williams was joined by Sergeant W. H. Smith, the two officers approached the home across the street, outside of which they encountered Juvenile.

Upon arriving at the residence from which the shots were believed to have originated, the officers asked Juvenile if his mother was home. After Juvenile went inside and informed his mother of the officers' presence, Sergeant Smith and Lieutenant Williams informed Juvenile's mother that shots had been fired into the home across the street and asked if Juvenile had been outside shooting. After initially responding in the negative, Juvenile's mother told officers that she had been home all day, with the exception of brief periods when she had left to drop off and pick up her husband. While in the presence of Juvenile's mother, the officers asked Juvenile if he had fired a gun that day and obtained a negative answer.

Sergeant Smith and Lieutenant Williams obtained permission from Juvenile's mother to search the area outside Juvenile's home. During that process, they found spent shotgun shells on the front porch. With the exception of an intervening birdhouse, there was a direct line of sight from the porch of the residence in which the Juvenile lived to the house which had been fired into.

At the time that the officers spoke with Juvenile's father for the purpose of telling him what they found, he told them that he "figured" that Juvenile had fired the shots in question. When the officers informed Juvenile's father that they were going to speak with Juvenile briefly outside, Juvenile's father told Juvenile to go with the officers and to be truthful. At that point, Sergeant Smith and Lieutenant Williams asked Juvenile if he would speak with them and received an affirmative response. Although the officers informed Juvenile's parents that they were welcome to accompany their son outside, neither parent said anything. Instead, both parents remained inside with the door shut while the officers spoke with Juvenile.

Sergeant Smith, Lieutenant Williams, and Juvenile went to a point about ten feet outside the home, where they talked for about five minutes. Everyone was standing at arm's length from each other during this discussion. Lieutenant Williams was wearing civilian clothes, while Sergeant Smith was in uniform. Although both officers were

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armed, neither of them touched or made any movement towards their weapons at any point. Juvenile was not placed under arrest, handcuffed, or searched. On the other hand, neither officer ever explicitly told Juvenile that he was free to leave or advised Juvenile of his rights under *Miranda* or N.C. Gen. Stat. § 7B-2101. Juvenile never indicated that he did not want to speak, asked to leave, or requested to speak with anyone else.

At the beginning of this conversation, the officers informed Juvenile that the available information tended to suggest that someone had fired a gun from his residence into the home across the street. After making this statement, the officers asked Juvenile, “did you do it?” In response, Juvenile admitted having fired the shot in question and stated that he had been attempting to hit a birdhouse that was across the street. Once Juvenile had made this admission, the remainder of the conversation focused on various details, including the number of times that Juvenile had actually fired the weapon. During this portion of the conversation, Juvenile admitted that he might have fired five or six shots in the direction of the birdhouse. Subsequently, Juvenile agreed to provide a written statement, ultimately writing a portion of this sitting inside a patrol vehicle and the remainder on the vehicle’s trunk.

### B. Procedural History

On 18 November 2011, juvenile petitions were filed, alleging that Juvenile should be adjudicated a delinquent juvenile for committing the offenses of injury to real property in violation of N.C. Gen. Stat. § 14-127 and injury to personal property worth more than \$200.00 in violation of N.C. Gen. Stat. § 14-160. The petitions were called for hearing before the trial court at the 5 January 2012 juvenile session of the Stanly County District Court. After conducting an evidentiary hearing, the trial court denied Juvenile’s motion to suppress his oral statement and granted his motion to suppress his written statement.<sup>1</sup> Following the trial court’s ruling, Juvenile admitted that he had committed the offenses alleged in the petitions. Based upon these admissions, the trial court adjudicated Juvenile a delinquent juvenile and

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1. Although Juvenile never filed a written suppression motion, the State agreed to waive any objection to the absence of such a written motion and to allow Juvenile to proceed on the basis of an oral motion. After orally indicating that Juvenile’s motion would be denied at the conclusion of the suppression hearing, the trial court filed a written order on 3 February 2012, ruling on Juvenile’s suppression motion which contained findings of fact and conclusions of law that are generally consistent with the factual recitation that appears in the text of this opinion.

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entered a dispositional order placing Juvenile on juvenile probation for six months on the condition that he comply with certain specified terms and conditions, including requirements that he abide by a designated curfew, continue to receive treatment, and make restitution to the owners of the damaged property. Juvenile noted an appeal to this Court from the trial court's adjudication and dispositional orders.

## II. Legal Analysis

[1] In challenging the trial court's orders, Juvenile contends that the trial court erred by denying his motion to suppress his oral admissions to investigating officers on the grounds that he was in custody at the time that he was questioned by Sergeant Smith and Lieutenant Williams and that he had not been advised of his rights under *Miranda* and N.C. Gen. Stat. § 7B-2101.<sup>2</sup> We do not find Juvenile's argument persuasive.

Appellate review of the denial of a motion to suppress is "strictly limited to determining whether the trial judge's underlying findings of fact are supported by competent evidence, in which event they are conclusively binding on appeal, and whether those factual findings in turn support the judge's ultimate conclusions of law." *State v. Cooke*, 306 N.C. 132, 134, 291 S.E.2d 618, 619 (1982). Any findings of fact which the appealing party does not challenge as lacking in adequate evidentiary support are binding for purposes of appellate review. *State v. Little*, 203 N.C. App. 684, 687, 692 S.E.2d 451, 454, *appeal dismissed*, 364 N.C. 329, 701 S.E.2d 246 (2010). A trial court's conclusions of law are, on the other hand, fully reviewable. *State v. Hughes*, 353 N.C. 200, 208, 539 S.E.2d 625, 631 (2000). As a result of the fact that Juvenile has not contested the sufficiency of the evidentiary support for most of the trial court's findings of fact and the fact that the one finding that Juvenile has challenged has adequate record support,

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2. Aside from challenging the validity of the trial court's ultimate conclusion that he had not been subjected to custodial interrogation, Juvenile argues that the trial court's finding that, "[w]hen the Juvenile went outside with the two officers, his parents were inside the home, just inside the door," lacks adequate evidentiary support. However, Lieutenant Williams testified at the suppression hearing that, while Juvenile's parents were not "able to hear what was going on" during the officers' conversation with Juvenile, they were in "the living room beyond the kitchen," which was separated from the door by a "washer and dryer area." As a result, although the record does not show that Juvenile's parents were immediately inside the door leading from the interior of the residence to the location at which Juvenile was being questioned, the record clearly supports the ultimate point of the challenged finding, which is that Juvenile's parents were near at hand during the questioning process. As a result, we conclude that, interpreted in this manner, the challenged finding is adequately supported by the record.



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the specific issue raised by Juvenile's challenge to the trial court's orders is the extent, if any, to which the trial court's findings support its conclusion that Juvenile did not orally admit to having fired a gun in the direction of the neighbor's house while being subjected to custodial interrogation.

According to the decision of the United States Supreme Court in *Miranda v. Arizona*, 384 U.S. 436, 479, 86 S. Ct. 1602, 1630, 16 L. Ed. 2d 694, 726 (1966), a suspect subjected to custodial interrogation must be advised "that he has the right to remain silent, that anything he says can be used against him in a court of law, that he has a right to the presence of an attorney, and that if he cannot afford an attorney one will be appointed for him." Similarly, N.C. Gen. Stat. § 7B-2101(a) provides that:

Any juvenile in custody must be advised prior to questioning:

- (1) That the juvenile has a right to remain silent;
- (2) That any statement the juvenile does make can be and may be used against the juvenile;
- (3) That the juvenile has a right to have a parent, guardian, or custodian present during questioning; and
- (4) That the juvenile has a right to consult with an attorney and that one will be appointed for the juvenile if the juvenile is not represented and wants representation.

"Before admitting into evidence any statement resulting from custodial interrogation, the court shall find that the juvenile knowingly, willingly, and understandingly waived the juvenile's rights." N.C. Gen. Stat. § 7B-2101(d). Although the undisputed evidence, as reflected in the trial court's findings, indicates that Juvenile was never advised of his rights under *Miranda* and N.C. Gen. Stat. § 7B-2101, "*Miranda* warnings and the protections of N.C. [Gen. Stat.] § 7B-2101 apply only to custodial interrogations." *In re W.R.*, 363 N.C. 244, 247, 675 S.E.2d 342, 344 (2009) (citing *In re W.R.*, 179 N.C. App. 642, 645, 634 S.E.2d 923, 926 (2006)). As a result, the critical issue that we must resolve in order to properly evaluate the merits of Juvenile's challenge to the denial of his suppression motion is whether Juvenile was in custody at the time that he orally admitted having fired the shot which struck the neighbor's residence. *In re Butts*, 157 N.C. App. 609, 612, 582

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S.E.2d 279, 282 (2003) (holding that “the threshold inquiry for a court ruling on a suppression motion based on [N.C. Gen. Stat.] § 7B-2101, is whether the respondent was in custody when the statement was obtained”), *disc. review improvidently allowed sub nom In re T.R.B.*, 358 N.C. 570, 595 S.E.2d 146 (2004).

A determination as to whether or not an individual subjected to questioning by law enforcement officers was in custody “requires the trial court to apply an objective test as to whether a reasonable person in the position of the [questioned individual] would believe himself to be in custody or that he had been deprived of his freedom of action in some significant way.” *Id.* at 613, 582 S.E.2d at 282 (quoting *State v. Sanders*, 122 N.C. App. 691, 693, 471 S.E.2d 641, 642 (1996)) (quotation marks omitted). Simply put, “[t]he test for determining if a person is in custody is whether, considering all the circumstances, a reasonable person would not have thought that he was free to leave because he had been formally arrested or had had his freedom of movement restrained to the degree associated with a formal arrest.” *W.R.*, 363 N.C. at 248, 675 S.E.2d at 344. In making the required determination, a reviewing court must consider the totality of the surrounding circumstances. *State v. Buchanan*, 353 N.C. 332, 339, 543 S.E.2d 823, 828 (2001). Among other things, determining whether a juvenile was in custody at the time that he or she made an inculpatory statement requires consideration of the juvenile’s age, “so long as the child’s age was known to the officer at the time of police questioning, or would have been objectively apparent.” *J.D.B. v. North Carolina*, \_\_\_ U.S. \_\_\_, \_\_\_, 131 S. Ct. 2394, 2406, 180 L. Ed. 2d 310, 326 (2011). In addition, “(1) the nature of the interrogator, (2) the time and place of the interrogation, (3) the degree to which suspicion had been focused on the defendant, (4) the nature of the interrogation and (5) the extent to which defendant was restrained or free to leave,” may also be relevant to a determination of whether a particular individual was in custody at the time that he or she made a statement which the prosecution seeks to have admitted into evidence. *State v. Crudup*, 157 N.C. App. 657, 660-61, 580 S.E.2d 21, 24 (2003) (*citing State v. Clay*, 39 N.C. App. 150, 155, 249 S.E.2d 843, 846 (1978), *rev’d on other grounds*, 297 N.C. 555, 256 S.E.2d 176 (1979)).

A careful analysis of the totality of the circumstances surrounding the making of Juvenile’s statement clearly indicates, as the trial court determined, that Juvenile was not subject to the degree of restraint inherent in a formal arrest at the time that he admitted having shot in the direction of the neighbor’s house. The fact that the

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investigating officers asked him to step outside, rather than instructing him to do so, suggests that Juvenile was not subject to any formal restraint at the time he was questioned. In addition, the record contains no indication that Juvenile did anything more during his conversation with Sergeant Smith and Lieutenant Williams than answer a simple, straightforward question. All three participants in this conversation were standing and remained at arm's length from each other during the time that the officers spoke with Juvenile. In addition, instead of being in uniform, Lieutenant Williams was wearing a sweatshirt and khaki pants during the questioning. As a result, instead of being involved in a closed door conference room with police and an assistant principal, *e.g.*, *J.D.B.*, \_\_\_ U.S. at \_\_\_, 131 S. Ct. at 2399, 180 L. Ed. 2d at 319, Juvenile was questioned in an open area in his own yard with his parents nearby. The conversation between Juvenile and the investigating officers occurred in broad daylight and lasted for about five minutes. As a result, the findings of fact set out in the trial court's order clearly support its determination that Juvenile was not subjected to custodial interrogation.

Admittedly, as Juvenile argues, he was immediately suspected of having shot at his neighbor's house and was questioned by investigating officers for that reason. "Although any interview of a suspect will necessarily possess coercive aspects, *Miranda* warnings are not required simply because the questioned person is suspected by the police of wrongdoing." *In re Hodge*, 153 N.C. App. 102, 108, 568 S.E.2d 878, 882 (citing *State v. Gaines*, 345 N.C. 647, 662, 483 S.E.2d 396, 405, *cert. denied*, 522 U.S. 900, 118 S. Ct. 248, 139 L. Ed. 2d 177 (1997)), *appeal dismissed*, 356 N.C. 613, 574 S.E.2d 681 (2002). In fact, "[a]bsent indicia of formal arrest, [the facts] that police have identified the person interviewed as a suspect and that the interview was designed to produce incriminating responses from the person are not relevant in assessing whether that person was in custody for *Miranda* purposes." *W.R.*, 363 N.C. at 248, 675 S.E.2d at 344 (citing *Stansbury v. California*, 511 U.S. 318, 324, 114 S. Ct. 1526, 1529-30, 128 L. Ed. 2d 293, 300 (1994)). Similarly, we conclude that the fact that Sergeant Smith and Detective Williams were armed lacks any particular probative force in this instance, given that almost all law enforcement officers are armed and the fact that neither officer made any motion toward or use of his weapon during the questioning process. As a result, these aspects of Juvenile's challenge to the trial court's denial of his suppression motion do not suffice to support a determination that he was subjected to custodial interrogation prior to admitting having fired a gun in the direction of the neighbor's residence.

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The fact that Juvenile's parents told him to speak honestly with Sergeant Smith and Lieutenant Williams does not establish the appropriateness of a different outcome either. The General Assembly has clearly encouraged parental involvement in the process by which juveniles facing delinquency allegations are questioned, having afforded such juveniles the right to have a "parent, guardian, or custodian present during questioning." N.C. Gen. Stat. § 7B-2101(a)(3); *see also* N.C. Gen. Stat. § 7B-2101(b) (providing that, "[w]hen the juvenile is less than 14 years of age, no in-custody admission or confession resulting from interrogation may be admitted into evidence unless the confession or admission was made in the presence of the juvenile's parent, guardian, custodian, or attorney").<sup>3</sup> Furthermore, "[t]he sole concern of the Fifth Amendment, on which *Miranda* was based, is governmental coercion." *Colorado v. Connelly*, 479 U.S. 157, 170, 107 S. Ct. 515, 523, 93 L. Ed. 2d 473, 486 (1986); *see also Rhode Island v. Innis*, 446 U.S. 291, 301, 100 S. Ct. 1682, 1690, 64 L. Ed. 2d 297, 308 (1980) (stating that *Miranda* warnings are intended to "vest a suspect in custody with an added measure of protection against coercive police practices"); *United States v. Jamison*, 509 F.3d 623, 625 (4th Cir. 2007) (holding that a defendant had not been subjected to custodial interrogation because his "freedom to terminate the interview was curtailed primarily by circumstances resulting from his injury and hospital admittance rather than by police restraint"). Although a determination that Juvenile's parents were acting as agents of the investigating officers might suffice to support a finding that Juvenile was in custody at the time in question, the record provides no support for such a determination in this case. *State v. Morrell*, 108 N.C. App. 465, 470, 424 S.E.2d 147, 151 (1993) (noting that, when an "accused's statements stem from custodial interrogation by one who in effect is acting as an agent of law enforcement, such statements are inadmissible unless the accused received a *Miranda* warning prior to questioning") (citing *State v. Etheridge*, 319 N.C. 34, 44, 352 S.E.2d 673, 679 (1987); *State v. Nations*, 319 N.C. 329, 331, 354 S.E.2d 516, 518 (1987); *Estelle v. Smith*, 451 U.S. 454, 466-68, 101 S. Ct. 1866, 1874-76, 68 L. Ed. 2d 359, 371-72 (1981)), *disc. review denied*, 333 N.C. 465, 427 S.E.2d 626. Simply put, although common sense suggests that a juvenile is likely to comply with a parental instruction to talk to investigating officers, "the fact that the defendant is youthful will not preclude the admission of his inculpatory statement absent mistreatment or coercion by the police." *State v. Fincher*, 309 N.C. 1, 8, 305

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3. Juvenile was 14 when the offenses at issue in this case were committed.

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S.E.2d 685, 690 (1983); *see also* *United States v. Conley*, 779 F.2d 970, 973 (4th Cir. 1985) (recognizing that an individual, such as a prisoner, would “always accurately perceive that his ultimate freedom of movement is absolutely restrained” and requiring additional police action in order to trigger the need for the administration of *Miranda* warnings), *cert. denied*, 479 U.S. 830, 107 S. Ct. 114, 93 L. Ed. 2d 61 (1986). Therefore, we are unable to conclude that the fact that Juvenile’s parents were present, knew that Sergeant Smith and Lieutenant Williams were speaking with Juvenile, and told Juvenile to talk to the investigating officers and to tell them the truth suggests that Juvenile was in custody at the time that he admitted having shot in the direction of the neighbor’s house. As a result, we hold that the trial court did not err by finding that Juvenile’s oral admission that he shot in the direction of the neighbor’s residence did not result from an impermissible custodial interrogation conducted without the provision of the warnings required by *Miranda* and N.C. Gen. Stat. § 7B-2101.<sup>4</sup>

### III. Conclusion

Thus, for the reasons set forth above, we conclude that neither of Juvenile’s challenges to the trial court’s adjudication and dispositional orders have merit. As a result, the trial court’s orders should be, and hereby are, affirmed.

AFFIRMED.

Chief Judge MARTIN and Judge STEELMAN concur.

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4. In addition, Juvenile points to the fact that Sergeant Smith and Lieutenant Williams did not tell him that he did not have to speak with them. Although evidence that an officer informed a suspect that he was not obligated to speak with investigating officers would certainly tend to support a finding that no custodial interrogation occurred, *Hodge*, 153 N.C. App. at 108-09, 568 S.E.2d at 882, Juvenile does not cite any authority in support of his implicit assertion that the converse of this proposition is true, and we know of none. In fact, such an argument comes close to suggesting that a truncated warning consistent with *Miranda* and N.C. Gen. Stat. § 7B-2101 needs to be given in order ensure that such warnings are unnecessary.

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IN THE MATTER OF T.J.C., K.K.C., B.N.C.

No. COA12-927

Filed 19 February 2013

**1. Termination of Parental Rights—cessation of reunification efforts—sufficiency of findings of fact—domestic violence**

The trial court did not abuse its discretion in a termination of parental rights case by ceasing reunification efforts and initiating termination of parental rights proceedings. There were extensive findings regarding respondent father's history of domestic violence, the impact of that violence on the minor children, and his lack of appreciation of the effect of such violence, even after attending the available programs.

**2. Termination of Parental Rights—grounds—neglect**

The trial court did not err by terminating respondents' parental rights to their three minor children. The findings of fact supported the conclusion of law that the parental rights of both respondents may be terminated on the ground of neglect.

Appeal by respondents from orders filed 16 June 2011 and 12 April 2012 by Judge Stanley L. Allen in District Court, Rockingham County. Heard in the Court of Appeals 31 January 2013.

*No brief for Rockingham County Department of Social Services, petitioner-appellee.*

*Sandlin & Davidian, PA by Debra A. Griffiths for guardian ad litem, appellee.*

*Peter Wood for respondent-appellant, mother.*

*J. Thomas Diepenbrock for respondent-appellant, father.*

STROUD, Judge.

Respondent-mother ("Toni") and respondent-father ("Fred") appeal from (1) a permanency planning order which directed cessation of reunification efforts and initiation of termination of parental rights proceedings, and (2) an order terminating their parental rights as to their three minor children: Brianne, Tom, and Keith.<sup>1</sup>

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1. To protect the identities of the juveniles and for ease of reading, we will refer to both the juveniles and respondents by pseudonym.

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## I. Background

The three juveniles were born to the marriage of Fred and Toni in May 2001, January 2007, and November 2007. The Rockingham County Department of Social Services (“DSS”) first became involved with the family in August 2005 by confirming reports that law enforcement officers had responded to the home multiple times to quell domestic violence. Between 1 May 2006 and 29 May 2010, DSS received several reports of incidents of domestic violence which involved Toni and Fred or Toni and ones of Fred’s relatives. During the 29 May 2010 incident, Toni attacked Fred with two knives after he had knocked her to the floor during a fight.

On 18 June 2010, DSS filed petitions alleging that the three children were neglected juveniles. The children were adjudicated neglected on 12 August 2010 by Judge Stanley L. Allen and were placed in the custody of DSS. After several review hearings, Judge Allen directed that reunification efforts cease by order filed on 16 June 2011. Each parent filed a notice to preserve the right to appeal the order ceasing reunification. Thereafter, on 19 August 2011, DSS filed a motion to terminate the parental rights of both parents. The court conducted hearings upon the motion on 3 November 2011, 14 February 2012, and 1 March 2012.

On 12 April 2012, Judge Allen entered an order terminating respondents’ parental rights on grounds that (1) they neglected the juveniles, and (2) they left the children in foster care or other placement outside the home without showing that reasonable progress has been made in correcting the conditions which led to the removal of the children. As an additional ground for terminating Toni’s parental rights, the trial court concluded that she is incapable of providing for the juveniles’ proper care and supervision such that they are dependent juveniles, and the incapability is likely to continue for the foreseeable future.

Although both parents appealed from the order ceasing reunification efforts, only Fred has specifically challenged that order. Both parents challenge the findings of grounds to terminate their parental rights.

## II. Permanency Planning Order

[1] We first address Fred’s challenge to the Permanency Planning Order ceasing reunification efforts. “This Court reviews an order that ceases reunification efforts to determine whether the trial court

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made appropriate findings, whether the findings are based upon credible evidence, whether the findings of fact support the trial court's conclusions, and whether the trial court abused its discretion with respect to disposition." *In re C.M.*, 183 N.C. App. 207, 213, 644 S.E.2d 588, 594 (2007) (citations omitted). Fred argues that although the court's order does recite the findings required by N.C. Gen. Stat. § 7B-507(b)(1) to cease reunification efforts, it "does not, through processes of logical reasoning from the evidentiary facts, find the ultimate facts." Fred does not argue that these findings are unsupported by the evidence. Rather, he submits that the court's findings of fact are essentially "evidentiary facts" and "do not support the ultimate findings of fact that reasonable efforts to reunify the children with their parents would be futile or inconsistent with the juveniles' health, safety, and need for a safe, permanent home within a reasonable period of time."

We are not persuaded by Fred's argument. The trial court did make specific findings of fact on an attached page

regarding the parent's progress in alleviating the problems that necessitated removal of the juvenile[s], progress that remains to be accomplished before reunification can be achieved, the current visitation plan and whether changes are in the juvenile[s'] best interests, the recommendations of RCDSS and the guardian *ad litem*, and other issues.

The court summarized its findings at the end as follows:

Despite the parents' efforts to comply with their services agreements and the services provided since the children were removed and during the years prior to removal, domestic violence has persisted on the part of both parents. Further, it appears that, despite some statements to the contrary, the parents continue to have some form of romantic relationship with each other. During joint visits and during transportation to those visits, they have bickered and argued. [Toni] still engages in at least verbal altercations with [Fred], minimizes the problems that she and [Fred] have, has not demonstrated any of the parenting skills she was to learn, has discussed inappropriate topics with the oldest child, and may not be able to rise to the challenge of full-time care of the children alone due in part to her



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limited intellectual functioning. [Fred] has not demonstrated anything that he should have learned from the ECHO Program, continues to engage in verbal altercations with [Toni] and has on at least one occasion since the children's removal physically assaulted her, calls her repeatedly, blames the domestic violence on her rather than accepting responsibility, and has acknowledged that they have continued some form of relationship. Fred's smoking breaks and focus on [Toni] have detracted from his bonding with the children during visits. From [Fred's] inability to give much information about the children during testing, Dr. Holm surmised that he had been relatively uninvolved with the children, which is in keeping with his behavior at visits. In short, both parents are unable to recognize the children's best interests, continue to expose them to dysfunctional behavior, and are more focused on making each other look bad than having the children returned to them. RCDSS has offered every service imaginable and there are no additional services to offer. The parents have continued the pattern of behavior that led to the children being removed and there is a great likelihood that pattern will continue into the future.

Dr. Holm notes that signs are already apparent of the impact on the children of the domestic violence and instability. He also notes that the children seem to be profiting from their out-of-home placement. The children have been in foster care since June of 2010. Based on the length of time the children have been in care, the parents' refusal or inability to correct the conditions that led to the removal, and the children's need for a safe and stable home within a reasonable period of time, their permanency plan should be adoption.

The court then found that return of the juveniles to the home would be contrary to their best interests for the reasons set forth in the order and previous orders, that it will not be possible for the juveniles to be returned home immediately or within six months, that DSS has made reasonable efforts to reunify, and that reunification efforts are clearly futile and contrary to the juveniles' best interests. The trial court resolved the material, disputed factual issues in its findings of evidentiary facts, those evidentiary facts show why the trial court

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found the necessary ultimate facts, and the findings as a whole support the trial court's conclusions. Therefore, we hold that the trial court, "through processes of logical reasoning, based on the evidentiary facts before it, [found] the ultimate facts essential to support the conclusions of law." *In re O.W.*, 164 N.C. App. 699, 702, 596 S.E.2d 851, 853 (2004) (citation and quotation marks omitted).

Fred also submits that the trial court abused its discretion in ceasing reunification efforts because the court ignored evidence that further reunification efforts would not be futile and would not be inconsistent with the children's health, safety, and need for a permanent home within a reasonable period of time. "A trial court may be reversed for abuse of discretion only upon a showing that its actions are manifestly unsupported by reason." *White v. White*, 312 N.C. 770, 777, 324 S.E.2d 829, 833 (1985). Given the extensive findings regarding respondent-father's history of domestic violence, the impact of that violence on the minor children, and Fred's lack of appreciation of the effect of such violence, even after attending the available programs, we find no abuse of discretion. Therefore, we affirm the Permanency Planning Order ceasing reunification efforts.

## III. Termination of Parental Rights

**[2]** We now address the parties' arguments with regard to the grounds for termination of their parental rights. Termination of parental rights proceeds in two stages: an adjudication stage and a dispositional stage.

At the adjudication stage, the party petitioning for the termination must show by clear, cogent, and convincing evidence that grounds authorizing the termination of parental rights exist. . . . Upon determining that one or more of the grounds for terminating parental rights exist, the court moves to the disposition stage to determine whether it is in the best interests of the child to terminate the parental rights.

*In re Young*, 346 N.C. 244, 247, 485 S.E.2d 612, 614-15 (1997) (citations omitted).

Termination of parental rights must be based upon clear, cogent and convincing evidence that grounds authorizing termination of parental rights exist. *Id.*, 485 S.E.2d at 614. We review an order terminating parental rights to determine whether the findings of fact are supported by clear and convincing evidence and whether the conclu-

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sions of law are supported by the findings of fact. *In re Shepard*, 162 N.C. App. 215, 221, 591 S.E.2d 1, 6, *disc. review denied sub nom In re D.S.*, 358 N.C. 543, 599 S.E.2d 42 (2004). We conduct *de novo* review of the court's conclusions of law. *In re S.N.*, 194 N.C. App. 142, 146, 669 S.E.2d 55, 59 (2008), *aff'd per curiam*, 363 N.C. 368, 677 S.E.2d 455 (2009).

Parental rights may be terminated upon a finding that the parent has abused or neglected the child. N.C. Gen. Stat. § 7B-1111(a)(1) (2011). A neglected child is one

who does not receive proper care, supervision, or discipline from the juvenile's parent, guardian, custodian, or caretaker; or who has been abandoned; or who is not provided necessary medical care; or who is not provided necessary remedial care; or who lives in an environment injurious to the juvenile's welfare; or who has been placed for care or adoption in violation of law.

N.C. Gen. Stat. § 7B-101(15) (2011).

"A finding of neglect sufficient to terminate parental rights must be based on evidence showing neglect at the time of the termination proceeding." *Young*, 346 N.C. at 248, 485 S.E.2d at 615. If the child is removed from the parent before the termination hearing, then "[t]he trial court must also consider any evidence of changed conditions in light of the evidence of prior neglect and the probability of a repetition of neglect." *In re Ballard*, 311 N.C. 708, 715, 319 S.E.2d 227, 232 (1984) (citation omitted). The court "must assess whether there is a substantial risk of future abuse or neglect of a child based on the historical facts of the case." *In re McLean*, 135 N.C. App. 387, 396, 521 S.E.2d 121, 127 (1999). Neglect may be manifested by "some physical, mental, or emotional impairment of the juvenile or a substantial risk of such impairment as a consequence of the failure to provide 'proper care, supervision, or discipline.'" *In re Safriet*, 112 N.C. App. 747, 752, 436 S.E.2d 898, 901-02 (1993) (citation omitted).

Both parties challenge certain findings of fact as unsupported by clear and convincing evidence. Both challenge findings suggesting that they have continued to maintain a domestic relationship with each other, that they have continued to engage in acts of violence with each other and other people after the children were placed in foster care, and that it is probable that they will continue to neglect the children.

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Toni separately contests findings of fact declaring that she struggled to implement the lessons she learned in classes designed to help her improve parenting skills, to handle conflict without resorting to violence, to meet her own basic needs without significant professional help, and to make progress in correcting the conditions that led to the removal of the children. She argues that the evidence shows that she took her reunification plan seriously, did everything that she was asked to do, and that there was no evidence showing that the violence between respondents negatively affected the minor children.

Fred separately challenges findings of fact indicating (1) he has continued to fail to accept any responsibility for or acknowledge the domestic violence, and (2) he has trouble disciplining the two younger children without demonstrating anger or raising his voice to them. He argues that any evidence of continuing aggression or violence stems from Toni and is clearly not credible.

We are bound by the trial court's findings of fact "where there is some evidence to support those findings, even though the evidence might sustain findings to the contrary." *Id.* at 110-11, 316 S.E.2d at 252-53. Findings of fact not challenged on appeal are presumed to be supported by competent evidence and are also binding. *In re J.K.C. and J.D.K.*, \_\_\_ N.C. App. \_\_\_, \_\_\_, 721 S.E.2d 264, 268 (2012).

The trial court made numerous findings about the respondents' relationship, their progress in learning parenting skills, employment, and other relevant issues. The trial court nicely summarized its findings of evidentiary fact and made the necessary finding of ultimate fact as to the likelihood of future neglect:

50. As set out in the above findings, despite both parents' participation in their services agreements, there has been little change in the status of their relationship with each other, no change in [Fred's] acknowledgement of or propensity toward domestic violence, no improvement in parenting skills or parental judgment, no change in [Toni's] ability to handle conflict without resorting to violence, little or no improvement in parenting skills or parental judgment, no change in [Toni's] inability to meet her own basic needs without significant professional help, and little or no progress in correcting the conditions that led to the children's removal from home.

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51. There is a high likelihood of repeated neglect if the children were returned to either parent's or both parents' care and custody, for the reasons set out above. All of the factors in Finding of Fact number 50 would make it unlikely that the parents would provide a safe environment and proper care, supervision and discipline for the children in the future.

The evidence supports the trial court's findings that respondents continue to have a close relationship, that their relationship is marked by aggression and violence, that neither respondent has learned proper parental judgment or how to control their aggressive tendencies, and that this environment is harmful to the children.

The social worker assigned to this case testified that she had received multiple anonymous reports that Toni and Fred were cohabiting at Fred's residence. In efforts to confirm these reports, the social worker drove past the residence several times at various times of the day between May and October 2011 and saw Toni's van parked there. On 12 August 2011, she saw Toni talking in the yard with one of Fred's next-door neighbors who was another client of the social worker. Toni's van was parked in Fred's driveway on that occasion. While visiting in Fred's home, the social worker saw on the couch and floor hospital bracelets from Toni's emergency room visits and other materials related to Toni's hospitalization in August 2011. A social worker testified that even after separate visitations were established, each parent would call the other on the telephone and bicker before, during, and after the visitations. The relevance of respondents' relationship is not, as Fred argues, whether they continued to have a romantic relationship, but whether their relationship, whatever it may have been, demonstrated a continuing trend of aggression, violence, and lack of appreciation for how their actions affect the children.

The parents do not contest findings of fact that they said upsetting things in the presence of the children. For example, on 19 April 2011, Fred told the oldest child she looked like a hobo because of her unkempt hair, which caused the child to cry. On the occasion of one child's birthday in January 2012, Fred asked Toni in an angry manner "who [she] was dressing up for," which upset the oldest child. During visits, each parent talked about the other in the presence of the children. Once in March or April 2011, Toni showed the oldest child her new outfit and commented that Fred had broken the belt by grabbing it. At another visit, Fred told the oldest child that he and Toni may be getting back together. The child asked Toni about it and Toni denied

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that she was planning to reunite with Fred but at the very next visit, she showed the child pictures of herself with Fred.

The record also contains a letter the oldest child wrote to the court and social worker in which she requested that her parents visit separately “because it doesn’t work out so good when there [sic] together.” She related in the letter the different emotions she felt when visited by her parents: happiness because she sees them; sadness when her mother tells bad things and her father takes sides with her mother and does not let the child talk; and anger when she is scolded by her paternal grandmother, her parents bicker, and her parents do not spend much time with the child and her siblings.

The court report prepared by the social worker for the court hearing on 10 March 2011 gave the basis for the child’s emotions. The social worker related that during the 22 February 2011 visit, Toni “fussed” at the eldest child for being disrespectful to her. When the child attempted to explain her feelings, Fred intervened and told the child that she was going to respect her mother. Later during the visit, Toni badgered the child with questions such as “Do you love me?” or “Why are you mad at me?” Whenever the social worker attempted to protect the child and remove her from the room, both parents became defensive and accused the social worker of turning their children against them.

During a visit in August 2011, Toni told the children that whether they returned home was dependent upon the oldest child. The social worker saw an immediate change in the demeanor of the oldest child, who became distant after Toni made this statement. Even though it was apparent that the oldest child was upset by something Toni said, Toni claimed the visit went well and all of the children enjoyed themselves. This evidence supports the trial court’s findings that neither parent has learned proper parenting skills or parental judgment.

Neither party has challenged the findings of fact regarding the multiple acts of domestic violence between the parents during the course of their relationship and the bickering between the parents while riding to and from visits and during initial visits with the children which required DSS to institute separate visits by each parent.

There was evidence to support the finding that respondent-mother has failed to learn how to resolve conflict non-violently, even after attending parenting classes and other programming. The social worker testified at the termination hearing that Toni continued to engage in physical altercations with others and inappropriate conver-

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sations with the children even after she had attended domestic violence and parenting classes. She related an incident occurring in the hallway of the courthouse on the day of a hearing on 3 November 2011 between Toni and her mother-in-law in which they engaged in a squabble about a twenty-dollar bill found on the floor. The social worker also testified that Toni told her that in October 2011, she had fought with a niece and blackened the niece's eye, and that on another occasion, she became angry with her sister's partner and put the partner on the hood of a car.

Additionally, there was evidence that Fred has continued to engage in domestic violence. The social worker also testified that Fred admitted to her that he had struck Toni while they were in the bedroom of his home in May 2011. He related that Toni called him by another man's name, which caused him to "lose control." Toni related that Fred choked her on that occasion. Fred argues that Toni's allegations of violence are simply not credible. Assessments of credibility, however, are reserved for the trial court and not reviewable by this Court. "It is elementary that the [fact finder] may believe all, none, or only part of a witness' testimony." *State v. Barr*, \_\_\_ N.C. App. \_\_\_, \_\_\_, 721 S.E.2d 395, 402 (2012) (citation, quotation marks, and brackets omitted). This evidence, including the statements by Toni, supports the trial court's findings that respondent-father has not changed his propensity for domestic violence.

Further, the evidence shows that the violence and aggression of respondents has had a negative impact on the minor children. Brianne, the oldest child, was admitted to a psychiatric hospital after she pointed a knife at another child in her foster home. When respondent-mother was asked at the termination hearing whether she found the knife incident "concerning," Toni responded by questioning why she had not been told about it. There was also evidence that the two younger children had violent emotional outbursts after visiting with respondents, including one instance in which To threatened to cut his younger brother.

The evidence as a whole supports the trial court's findings that respondents continue to act aggressively and violently toward each other and toward others despite the parenting classes and therapy they have attended. The trial court found that both parents had attended the required classes, that both parents love their children, and that the children love their parents. These factors, however important, are not dispositive as to future neglect. The parents must

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have learned the necessary skills to provide proper care and supervision to their children.

The findings of fact reflect that the children lived in an environment injurious to their safety while they resided with their parents. The children witnessed numerous episodes of domestic violence between the parents over the course of several years. After the children were removed from the home, the parents continued to engage in violence with each other and others and to bicker in the presence of the children. Their behavior has had a negative impact upon the children. The evidence supports the trial court's findings that despite participating in available programming, respondents still do not appreciate that their behavior negatively affects their children. This factual history supports the trial court's findings that there is a high likelihood of future neglect and that it would be in the best interests of the children to terminate respondents' parental rights. The findings of fact support the conclusion of law that the parental rights of both respondents may be terminated on the ground of neglect.

As only one ground is needed to terminate parental rights, we need not consider the other ground of failure to make reasonable progress in correcting the conditions that led to the removal of the children from the home. *In re P.L.P.*, 173 N.C. App. 1, 8, 618 S.E.2d 241, 246 (2005), *aff'd per curiam*, 360 N.C. 360, 625 S.E.2d 779 (2006). Therefore, we affirm the order terminating respondents' parental rights.

## IV. Conclusion

We hold that the findings of the trial court in both challenged orders were supported by clear, cogent, and convincing evidence, that the trial court made the necessary findings of ultimate fact, and that those findings supported the trial court's legal conclusions. As a result, we affirm both the 16 June 2011 permanency planning order and the 12 April 2012 order terminating respondents' parental rights.

AFFIRMED.

Judges STEPHENS and DILLON concur.



## IN RE T.R.T.

[225 N.C. App. 567 (2013)]

IN THE MATTER OF T.R.T.

No. COA12-905

Filed 19 February 2013

**1. Child Abuse, Dependency, and Neglect—neglect—facts supported by evidence—conclusion support by facts**

The trial court did not err in a child neglect case by concluding that the minor child was neglected. The findings of fact were supported by competent evidence, and the findings supported the conclusion of law that the child was neglected.

**2. Child Abuse, Dependency, and Neglect—visitation—via Skype—not sufficient**

The trial court erred in a child neglect case by ordering that respondent mother's sole visitation with the minor child take place via Skype. The trial court did not find that respondent-mother forfeited her right to visitation or that visitation was not in the minor child's best interest and communication via Skype is not visitation as contemplated by N.C.G.S. § 7B-905(c).

Appeal by respondent-mother from order entered 25 April 2012 by Judge J.H. Corpening, II, in New Hanover County District Court. Heard in the Court of Appeals 29 January 2013.

*Regina Floyd-Davis for New Hanover County Department of Social Services petitioner-appellee.*

*Mark L. Hayes for respondent-mother appellant.*

*Associate Counsel Deana K. Fleming for guardian ad litem.*

McCULLOUGH, Judge.

Respondent-mother appeals from an order concluding that her son, T.R.T., was neglected and that it was in T.R.T.'s best interest to remain in the custody of the New Hanover County Department of Social Services ("DSS"). We affirm in part and reverse and remand in part.

On 6 February 2012, DSS filed a juvenile petition alleging that T.R.T. was neglected in that he lived in an environment injurious to his welfare and did not receive proper care, supervision, or discipline from his mother. DSS had previously been involved with the family

## IN RE T.R.T.

[225 N.C. App. 567 (2013)]

due to respondent-mother's mental health issues; T.R.T. had previously been adjudicated neglected; and T.R.T. had been in DSS custody from July 2010 until 27 October 2011, when he was returned to respondent-mother. The petition alleged that on 9 November 2011, DSS received a report of inappropriate supervision. According to the petition, five-year-old T.R.T. had left respondent-mother's apartment and sought food and assistance from residents in the apartment complex. The petition alleged that respondent-mother was "decompensating," had terminated counseling, and was not adhering to her medication regimen. T.R.T. was taken into nonsecure custody on the following day.

Following a hearing on 29 March 2012, the trial court entered an order on 25 April 2012 concluding that T.R.T. was a neglected juvenile within the definition of N.C. Gen. Stat. § 7B-101(15) (2011). In the dispositional portion of the order, the trial court maintained custody with DSS. Respondent-mother timely appealed from the order.

## I.

**[1]** Respondent-mother first challenges the trial court's adjudication of neglect. The trial court made the following findings of fact to support its conclusion that T.R.T. was neglected:

1. . . . [T.R.T.] was previously in the legal custody of [DSS] from July 20, 2010 through October 10, 2011. On November 9, 2011 [DSS] received a child protective services report alleging inappropriate supervision and care of [T.R.T.].

2. [T.R.T.] was allegedly seeking food and assistance from a neighbor because he was unable to wake his mother. The distance between [T.R.T.'s] home and the neighbor's home was estimated to be two city blocks. On January 5, 2012, the Case Decision determined the family in need of services and on January 5, 2012, the case was transferred to on-going services.

3. That between January 5, 2012 and the filing of the Juvenile Petition, [respondent-mother] refused to cooperate with [DSS]'s attempts at weekly home visits, attendance in parenting classes, development of an In-Home Family Services Plan, participation in a Child and Family Team meeting, and consistent mental health

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[225 N.C. App. 567 (2013)]

treatment. She informed [DSS] via email of her refusal to cooperate, and demanded that [DSS] close her case.

4. That Social Worker, Pam Nelson has known [respondent-mother] for the past five years and has knowledge of [respondent-mother]’s symptoms of regression. Ms. Nelson noticed a decline in [respondent-mother]’s personal appearance, hygiene and living environment. Ms. Nelson determined that services needed to be implemented to ensure [respondent-mother]’s mental health issues were being properly addressed.

5. That [respondent-mother]’s mental health therapist, Andrea Murrow, expressed concerns that [respondent-mother]’s mental health had deteriorated significantly and expressed concern for her welfare as well as the safety of her son. [DSS] believed [respondent-mother] to be noncompliant with her psychotropic medication regimen; however, [DSS] was unable to verify compliance with her medication and mental health treatment due to her refusal to sign releases for information.

6. That [respondent-mother]’s refusal to cooperate with [DSS], which directly impacted said agency’s ability to determine her mental status and compliance with prescribed psychotropic medications and lack of appropriate supervision, placed the juvenile at risk of substantial harm.

“Allegations of neglect must be proven by clear and convincing evidence. In a non-jury neglect adjudication, the trial court’s findings of fact supported by clear and convincing competent evidence are deemed conclusive, even where some evidence supports contrary findings.” *In re Helms*, 127 N.C. App. 505, 511, 491 S.E.2d 672, 676 (1997) (citation omitted). If competent evidence supports the findings, they are “binding on appeal.” *In re McCabe*, 157 N.C. App. 673, 679, 580 S.E.2d 69, 73 (2003).

Respondent-mother argues that the findings of fact do not support the trial court’s conclusion of neglect because (1) the trial court did not and could not base its adjudication on T.R.T.’s alleged excursion from the home; and (2) the trial court improperly concluded that uncertainty regarding respondent-mother’s mental health rendered T.R.T. neglected.

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As to her first argument, respondent-mother contends that finding of fact number 2 is based solely on allegations that T.R.T. left respondent-mother's home unsupervised, and even if the trial court had made a finding that T.R.T. left his mother's home unsupervised, the evidence is not competent to support such a finding. Respondent-mother is correct in her assertion that finding of fact number 2 contains only an allegation that T.R.T. left his home unsupervised. However, her challenge to this finding is immaterial to the trial court's adjudication of neglect. It appears that the trial court's ultimate determination was not based on a finding that T.R.T. actually left the home unsupervised. Findings of fact numbers 1 and 2 provide historical context for the case and illustrate why DSS began a second investigation.

Moreover, even if the trial court had made a finding that T.R.T. left the apartment unsupervised, such a finding would have been supported by the evidence. At the hearing, Social Worker Pamela Nelson testified that at one of her home visits, T.R.T. acknowledged that he left the apartment on his own and admitted that he would probably do it again. Respondent-mother argues that this testimony is impermissible hearsay; however, she did not object to this testimony at the hearing and therefore cannot raise this issue on appeal. *See State v. Robertson*, 149 N.C. App. 563, 569, 562 S.E.2d 551, 556 (2002) (a party must object to testimony on the challenged basis to properly preserve the issue for appeal). Therefore, we reject respondent-mother's challenge to finding of fact number 2.

As to her second argument, respondent-mother challenges findings of fact numbers 4 and 5, both of which pertain to her mental health. Respondent-mother contends that finding of fact number 4 is based on speculation. We disagree. First, we note that none of the language in finding 4 uses speculative terms. Rather, this finding is based solely on Ms. Nelson's direct observations of respondent-mother and her familiarity with respondent-mother's history of mental health issues. Furthermore, this finding of fact is supported by competent evidence in the record. At the hearing, Ms. Nelson testified that she had known respondent-mother for five years; that she visited respondent-mother after the report of inappropriate supervision; and that respondent-mother's physical appearance and the condition of her apartment had deteriorated. Ms. Nelson testified that based on her observations, respondent-mother was in need of services. We find the foregoing testimony sufficient to support finding of fact number 4, and we accordingly reject respondent-mother's argument.

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Respondent-mother also objects to the first sentence in finding of fact number 5. She argues that it is based on incompetent hearsay evidence. We agree with respondent-mother's argument. It appears that this finding was based on testimony from social worker Allison Nance regarding observations by respondent-mother's therapist, Andrea Murrow. Counsel for respondent-mother objected to Ms. Nance's testimony, and the trial court sustained the objection. Therefore, the trial court should have disregarded the objectionable testimony. This Court has acknowledged the "well-established supposition that the trial court in a bench trial 'is presumed to have disregarded any incompetent evidence.'" *In re J.B.*, 172 N.C. App. 1, 16, 616 S.E.2d 264, 273 (2005) (quoting *In re Huff*, 140 N.C. App. 288, 298, 536 S.E.2d 838, 845 (2000)). Here, however, the trial court cannot be presumed to have disregarded the incompetent evidence because the trial court made findings based on the objectionable testimony. Nonetheless, even without this finding of fact, we conclude that the trial court's findings of fact support an adjudication of neglect. *See In re T.M.*, 180 N.C. App. 539, 547, 638 S.E.2d 236, 240 (2006) ("[W]e agree that some of [the challenged findings] are not supported by evidence in the record. When, however, ample other findings of fact support an adjudication of neglect, erroneous findings unnecessary to the determination do not constitute reversible error.").

Lastly, respondent-mother invokes this Court's longstanding requirement "that there be some physical, mental, or emotional impairment of the juvenile or a substantial risk of such impairment as a consequence of the failure to provide 'proper care, supervision, or discipline.'" *In re Safriet*, 112 N.C. App. 747, 752, 436 S.E.2d 898, 901-02 (1993) (quoting *In re Thompson*, 64 N.C. App. 95, 101, 306 S.E.2d 792, 796 (1983)). Respondent-mother argues that the evidence is insufficient to sustain the conclusion that T.R.T. suffered from an impairment.

While it is true that T.R.T. did not suffer from an actual impairment, the trial court ultimately found that respondent-mother's refusal to cooperate with DSS placed him at risk of substantial harm. We find that this ultimate finding complies with the requirement stated above, that it is supported by the evidence, and that it supports the trial court's adjudication of neglect.

T.R.T. had been in respondent-mother's custody for only a month when DSS received the report of inappropriate supervision. During the investigation, Ms. Nelson observed that respondent-mother's personal appearance, hygiene, and the condition of her home had deteri-

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orated. At a home visit, respondent-mother and Ms. Nelson discussed safety measures which respondent-mother could take in order to properly supervise T.R.T.; and respondent-mother admitted that she had difficulty disciplining and controlling T.R.T. After Ms. Nelson determined that respondent-mother was in need of services, respondent-mother refused to cooperate with DSS. She refused to take parenting classes, refused free daycare for T.R.T., admitted that she was no longer attending mental health therapy, and refused to allow DSS access to her records to determine whether she was compliant with her mental health medication. Moreover, respondent-mother testified at the hearing, where she admitted that the social workers' testimony was accurate. She also admitted to refusing services from DSS.

This evidence, in light of T.R.T.'s past adjudication of neglect and the social workers' knowledge of respondent-mother's history of mental health issues, was sufficient for the trial court to determine that respondent-mother's refusal to cooperate with DSS placed T.R.T. at risk of substantial harm. *See In re C.M.*, 183 N.C. App. 207, 210, 644 S.E.2d 588, 592 (2007) (affirming a finding of neglect based on parents' previous involvement with DSS and failure to comply with case plan). Accordingly, we affirm the trial court's conclusion that T.R.T. was a neglected juvenile.

## II.

[2] Next, respondent-mother challenges the portion of the trial court's disposition order pertaining to visitation. Our juvenile code provides that "[a]ny dispositional order . . . under which the juvenile's placement is continued outside the home shall provide for appropriate visitation as may be in the best interests of the juvenile and consistent with the juvenile's health and safety." N.C. Gen. Stat. § 7B-905(c) (2011). "The awarding of visitation of a child is an exercise of a judicial function, and a trial court may not delegate this function to the custodian of a child." *In re E.C.*, 174 N.C. App. 517, 522, 621 S.E.2d 647, 652 (2005). This Court has previously stated that:

In the absence of findings that the parent has forfeited [her] right to visitation or that it is in the child's best interest to deny visitation "the court should safeguard the parent's visitation rights by a provision in the order defining and establishing the time, place[,] and conditions under which such visitation rights may be exercised."

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*Id.* at 522, 621 S.E.2d at 652 (alteration in original) (quoting *In re Stancil*, 10 N.C. App. 545, 552, 179 S.E.2d 844, 849 (1971)). We have further held:

As a result, even if the trial court determines that visitation would be inappropriate in a particular case or that a parent has forfeited his or her right to visitation, it must still address that issue in its dispositional order and either adopt a visitation plan or specifically determine that such a plan would be inappropriate in light of the specific facts under consideration.

*In re K.C. & C.C.*, 199 N.C. App. 557, 562, 681 S.E.2d 559, 563 (2009).

In the instant case, the trial court's order provided the following regarding visitation:

That the Department is authorized to set up Skype visitation for [respondent-mother] with [T.R.T.]. The Skype visitation is to occur during the supervised visitation class with Ms. Schultz at the Child Advocacy Parenting Place (CAPP). The facilitators are authorized to terminate the Skype visitation, if [respondent-mother] does not comply with any necessary re-direction. Visitation may be expanded in the discretion of the Department and the Guardian ad Litem.

Respondent-mother argues that the trial court erred in ordering the visitation plan because the court failed to make a finding that respondent-mother forfeited her right to visitation or that visitation was not in T.R.T.'s best interest. In so arguing, respondent-mother takes the position that communication via Skype is not visitation as contemplated by N.C. Gen. Stat. § 7B-905(c), and that the trial court's order effectively denies her visitation with T.R.T. We agree.

The trial court did not permit face-to-face visitation, but instead allowed respondent-mother to communicate with T.R.T. via Skype. Skype is a software application that allows video communication between individuals using an internet connection, webcam, and computer or mobile device with a microphone or speakers. *See* What is Skype?, <http://beta.skype.com/en/what-is-skype> (last visited 31 Jan. 2013). We conclude that, contrary to the assertions of DSS and the guardian ad litem, communication via Skype does not constitute visitation as contemplated by N.C. Gen. Stat. § 7B-905(c). Nothing in our juvenile code states that electronic communication may be substi-

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tuted for in-person visitation. To the contrary, our General Statutes state that “[e]lectronic communication with a minor child may be used to *supplement* visitation with the child. Electronic communication may not be used as a replacement or substitution for custody or visitation.” N.C. Gen. Stat. § 50-13.2(e) (2011) (emphasis added). “Electronic communication” is defined as “contact, other than face-to-face contact, facilitated by electronic means, such as by telephone, electronic mail, instant messaging, video conferencing, wired or wireless technologies by Internet, or other medium of communication.” Skype is at essence a form of video conferencing and therefore is included in the definition of “electronic communication” found in Section 50-13.2(e).

Although this section is found in Chapter 50 of our General Statutes, nothing limits subsection (e) to custody actions brought pursuant to Chapter 50. Unlike subsection (a), which applies to “[a]n order for custody of a minor child entered *pursuant to this section*,” subsection (e) applies to “[a]n order for custody of a minor child.” N.C. Gen. Stat. § 50-13.2(a), (e) (emphasis added). We therefore hold that it is a generic provision which applies to all custody actions. *See Belk v. Belk*, \_\_\_ N.C. App. \_\_\_, \_\_\_, 728 S.E.2d 356, 365 (2012) (concluding that a generic provision in N.C. Gen. Stat. § 6-21(2) allowing for the award of attorneys’ fees in an action to fix the rights and duties of a party under a trust agreement applies to an action for the removal of a custodian and resulting accounting brought pursuant to Chapter 33A of our General Statutes); *see also Food Stores v. Board of Alcoholic Control*, 268 N.C. 624, 628-29, 151 S.E.2d 582, 586 (1966) (“Where there is one statute dealing with a subject in general and comprehensive terms, and another dealing with a part of the same subject in a more minute and definite way, the two should be read together and harmonized, if possible, with a view to giving effect to a consistent legislative policy[.]” (internal quotation marks and citation omitted)). Based on the foregoing, we conclude that by ordering only Skype visitation, the trial court’s order denied respondent-mother visitation with T.R.T as contemplated by N.C. Gen. Stat. § 7B-905(c).

Despite denying visitation, the trial court did not make any specific findings that respondent-mother forfeited her right to visitation or that visitation would be inappropriate under the circumstances. *See K.C.*, 199 N.C. App. at 562, 681 S.E.2d at 563. The order therefore fails to comply with N.C. Gen. Stat. § 7B-905(c). As a result, we remand this case to the trial court for additional findings and conclusions relating to the issue of visitation.



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Furthermore, should a trial court wish to order electronic communication as a supplement to visitation between a parent and juvenile, it must comply with the pertinent statutory authority. To reiterate, such communications are governed by N.C. Gen. Stat. § 50-13.2(e), which provides, in pertinent part, the following:

An order for custody of a minor child may provide for visitation rights by electronic communication. In granting visitation by electronic communication, the court shall consider the following:

- (1) Whether electronic communication is in the best interest of the minor child.
- (2) Whether equipment to communicate by electronic means is available, accessible, and affordable to the parents of the minor child.
- (3) Any other factor the court deems appropriate in determining whether to grant visitation by electronic communication.

The court may set guidelines for electronic communication, including the hours in which the communication may be made, the allocation of costs between the parents in implementing electronic communication with the child, and the furnishing of access information between parents necessary to facilitate electronic communication.

*Id.*

Although the trial court's findings set up some guidelines for Skype communication and touched on the court's rationale for such communication, the court should make sure it considers items under this section. Consequently, we conclude that the trial court erred in ordering electronic video communication between respondent-mother and T.R.T. We therefore also remand the case for additional findings in accordance with N.C. Gen. Stat. § 50-13.2(e).

Affirmed in part; reversed and remanded in part.

Judges HUNTER (Robert C.) and DAVIS concur.

**MANNING v. ANAGNOST**

[225 N.C. App. 576 (2013)]

HAROLD MANNING, AS ADMINISTRATOR OF THE ESTATE OF EVANGELINE  
REGINA MANNING, PLAINTIFF

v.

DR. JOHN WILLIAM ANAGNOST, DEFENDANT

No. COA12-1030

Filed 19 February 2013

**1. Evidence—testimony—character for truthfulness—opened door—failure to object**

The trial court did not err in a wrongful death case by permitting defendant to introduce the testimony of three witnesses who testified to defendant doctor's character for truthfulness. By calling into question the credibility of defendant, plaintiff opened the door for defendant to present the three witnesses. Although plaintiff further contended that the lay witnesses were not disclosed in defendant's discovery scheduling order, this issue was not preserved because plaintiff did not object at trial.

**2. Evidence—transcript of deposition—unavailable witness—interest of justice**

The trial court did not abuse its discretion in a wrongful death case by allowing defendant to present the transcript of a deposition of an unavailable witness at trial in the interest of justice.

**3. Witnesses—treating physician—lay witness—not required to be admitted as expert**

The trial court did not abuse its discretion in a wrongful death case by concluding that the testimony of decedent's treating physician was permissible even though the doctor had not been admitted as an expert. A treating physician in a medical malpractice action who testifies regarding the care rendered to a patient does not testify as an expert, but as a lay witness. Defendant was not required to tender the treating physician as an expert witness.

**4. Pleadings—answer—allegations denied in answer—refuted at trial—complete medical records not available when answer filed—good faith**

The trial court did not abuse its discretion in a wrongful death case by allowing defendant doctor to refute allegations contained in plaintiff's complaint at trial that he had denied in his answer on the basis of lack of knowledge and information. Defendant had denied certain allegations contained in plaintiff's

**MANNING v. ANAGNOST**

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complaint in good faith since it was expressly based on the fact that the complete medical records were not available for review at the time the answer was filed.

Appeal by plaintiff from judgment entered 15 March 2012 by Judge William R. Pittman in New Hanover County Superior Court. Heard in the Court of Appeals 9 January 2013.

*Brent Adams & Associates, by Brenton D. Adams for plaintiff-appellant.*

*Walker, Allen, Grice, Ammons & Foy, L.L.P., by Jerry A. Allen, Jr., for defendant-appellee.*

STEELMAN, Judge.

Where plaintiff challenged the credibility of defendant at trial, the trial court did not err in admitting character evidence of defendant's truthfulness. The trial court did not err in allowing defendant to present the deposition of a witness at trial in the interest of justice. Defendant was not required to tender a treating physician as an expert witness. The trial court did not abuse its discretion in holding that defendant had denied certain allegations contained in plaintiff's complaint in good faith.

I. Factual and Procedural History

Harold Manning (plaintiff) was married to Evangeline Regina Manning (decendent). On 19 September 2007, Dr. John William Anagnost (defendant) saw decendent in his medical office, at which time he instructed her to go immediately to the hospital. Decendent elected to go to choir practice that evening, and went to the hospital the next day, 20 September 2007. At the time that she was admitted to the hospital, decendent was taking Coumadin, which prevents blood clotting.

At 4:15 p.m., plaintiff left decendent's room. When he returned at 5:15 p.m., decendent was not in the room, and someone was mopping blood from the floor. Plaintiff was informed that decendent had fallen, struck her head, and been moved to a room across the hall. Decendent had been found after her fall by Nurse Karen Sullivan, who discovered decendent with injuries and facial swelling. Decendent complained of headaches.

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On 21 September 2007, plaintiff received a telephone call from the hospital that his wife was in grave condition, and that he should come to the hospital immediately. Upon arrival, plaintiff was informed that decedent had suffered permanent brain damage from a subdural hematoma, and that her chances of recovery were slight. Decedent was given palliative care until her death on 27 September 2007.

On 24 September 2009, plaintiff filed this action seeking monetary damages for the wrongful death of his wife based upon the negligence of defendant and others. Claims against all of the other defendants were voluntarily dismissed by plaintiff after jury selection. The jury found that the death of plaintiff's decedent was not caused by defendant's negligence. On 15 March 2012, the trial court entered judgment, dismissing plaintiff's claim with prejudice.

Plaintiff appeals.

## II. Character Testimony

[1] In his first argument, plaintiff contends that the trial court erred by permitting defendant to introduce the testimony of three witnesses who testified to defendant's character for truthfulness. We disagree.

### A. Standard of Review

"[W]hether a lay witness may testify as to an opinion is reviewed for abuse of discretion." *State v. Washington*, 141 N.C. App. 354, 362, 540 S.E.2d 388, 395 (2000), *disc. review denied*, 353 N.C. 396, 547 S.E.2d 427-28 (2001).

### B. Analysis

Our Supreme Court has held that "[w]here a party testifies *and the credibility of his testimony is challenged*, testimony that his general character is good is competent and proper evidence for consideration upon the truthfulness of his testimony." *Holiday v. Cutchin*, 311 N.C. 277, 280, 316 S.E.2d 55, 57-58 (1984) (citations omitted). A witness' credibility may be attacked or supported by evidence of reputation or opinion. N.C. R. Evid. 608(a). Evidence of truthful character is admissible once a witness' character for truthfulness has been attacked by opinion or reputation. *Id.*

At trial, plaintiff repeatedly attacked defendant's testimony that he had personally examined decedent on 20 September 2007, following her fall. The trial court conducted a hearing outside of the presence of the jury prior to admitting the testimony of the three

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character witnesses. During that hearing, counsel for plaintiff acknowledged that he had accused defendant of not personally performing an examination of decedent on 20 September 2007.

By calling into question the credibility of defendant, plaintiff opened the door for defendant to present the three witnesses who testified as to his character for truthfulness.

Plaintiff further contends that the lay witnesses were not disclosed in defendant's discovery scheduling order. However, because plaintiff did not raise this objection at trial, it is not properly preserved on appeal. *See* N.C. R. App. P. 10(a)(1).

This argument is without merit.

### III. Admission of Deposition Testimony

[2] In his second argument, plaintiff contends that the trial court erred in permitting defendant to introduce the transcript of the deposition of Dr. George Alsina. We disagree.

#### A. Standard of Review

"On appeal, the standard of review of a trial court's decision to exclude or admit evidence is that of an abuse of discretion. An abuse of discretion will be found only when the trial court's decision was so arbitrary that it could not have been the result of a reasoned decision." *Brown v. City of Winston-Salem*, 176 N.C. App. 497, 505, 626 S.E.2d 747, 753 (2006) (internal quotations and citations omitted).

The deposition of a witness, whether or not a party, may be used by any party for any purpose if the court finds: . . . that the witness is at a greater distance than 100 miles from the place of trial or hearing, . . . or that the party offering the deposition has been unable to procure the attendance of the witness by subpoena; or upon application and notice, that such exceptional circumstances exist as to make it desirable, in the interest of justice and with due regard to the importance of presenting testimony of witnesses orally in open court, to allow the deposition to be used. . .

N.C. R. Civ. P. 32 (a)(4).

#### B. Analysis

The trial court allowed defendant to introduce Dr. Alsina's deposition transcript into evidence after finding that Dr. Alsina was

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unavailable to testify at trial. Plaintiff contends that this was improper under Rule 32 of the North Carolina Rules of Civil Procedure.

Rule 32 provides that a deposition may be used at trial against any party who was present at the taking of the deposition if the witness is at a greater distance than 100 miles from the place of trial, if the party offering the deposition has been unable to procure the attendance of the witness by subpoena, or when circumstances exist to make it desirable, in the interest of justice, to admit the deposition. N.C. R. Civ. P. 32.

In the instant case, Dr. Alsina's office was located in New Hanover County, the county where the case was being tried. Plaintiff contends that, because Dr. Alsina was located within 100 miles, Rule 32 prohibited the use of his deposition at trial. However, we have previously held that a deposition is admissible so long as *one* of the foundational requirements of Rule 32 has been satisfied. *Suarez v. Wotring*, 155 N.C. App. 20, 28, 573 S.E.2d 746, 751 (2002). It is not necessary that Dr. Alsina be over 100 miles away, *and* unable to be procured by subpoena, *and* that justice demands his deposition be admitted; the presence of any one of the three requirements is sufficient.

In the instant case, Dr. Alsina was served with a subpoena both by plaintiff and defendant to appear at the trial of this case. At some point, plaintiff released Dr. Alsina from his subpoena. Dr. Alsina had advised all parties that he would be out of state at a conference during the projected first week of trial. It was agreed that he could go to the conference, since his testimony would not be required until the third week of trial. When plaintiff unexpectedly dismissed the other defendants following jury selection, the trial schedule was accelerated, and Dr. Alsina was still out of state when defendant had to present his evidence. The trial court held that Dr. Alsina's absence was "acquiesced by both parties[.]" and that "in the interests of justice" the deposition could be presented to the jury, "subject to the usual completeness requirements of the rules."

The trial court did not abuse its discretion in ruling that, in the interest of justice, the transcript of Dr. Alsina's deposition could be presented to the jury.

This argument is without merit.

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IV. Dr. Alsina Was Not Qualified as an Expert Witness

[3] In his third argument, plaintiff contends that Dr. Alsina's testimony was impermissible expert testimony, as Dr. Alsina had not been formally admitted as an expert. We disagree.

A. Standard of Review

"[W]hether a lay witness may testify as to an opinion is reviewed for abuse of discretion." *State v. Washington*, 141 N.C. App. 354, 362, 540 S.E.2d 388, 395 (2000), *disc. review denied*, 353 N.C. 396, 547 S.E.2d 427-28 (2001).

B. Analysis

A treating physician in a medical malpractice action who testifies regarding the care rendered to a patient does not testify as an expert, but as a lay witness. *Turner v. Duke Univ.*, 325 N.C. 152, 167-68, 381 S.E.2d 706, 715-16 (1989). In the instant case, Dr. Alsina was a treating physician for decedent. His testimony was lay testimony, and defendant was not required to tender him as an expert witness.

This argument is without merit.

V. Effect of Defendant's Denials in Answer

[4] In his fourth argument, plaintiff contends that the trial court erred in allowing defendant to refute allegations contained in plaintiff's complaint that he had denied in his answer on the basis of lack of knowledge and information. We disagree.

A. Standard of Review

"It is well established that where matters are left to the discretion of the trial court, appellate review is limited to a determination of whether there was a clear abuse of discretion." *White v. White*, 312 N.C. 770, 777, 324 S.E.2d 829, 833 (1985). "Abuse of discretion results where the court's ruling is manifestly unsupported by reason or is so arbitrary that it could not have been the result of a reasoned decision." *State v. Hennis*, 323 N.C. 279, 285, 372 S.E.2d 523, 527 (1988); *see also White*, 312 N.C. at 777, 324 S.E.2d at 833 ("A trial court may be reversed for abuse of discretion only upon a showing that its actions are manifestly unsupported by reason . . . [or] upon a showing that [the trial court's decision] was so arbitrary that it could not have been the result of a reasoned decision.").

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**B. Analysis**

Rule 8 of the North Carolina Rules of Civil Procedure specifically provides that if a party is “without knowledge or information sufficient to form a belief as to the truth of an averment, he shall so state and this has the effect of a denial.” N.C. R. Civ. P. 8(b). A denial or qualification of an averment must be made in good faith. One not made in good faith may be stricken. *WXQR Marine Broadcasting Corp. v. Jai, Inc.*, 83 N.C. App. 520, 521, 350 S.E.2d 912, 913 (1986).

In the instant case, defendant denied certain allegations contained in plaintiff’s complaint based on “lack of knowledge and information.” This denial was expressly based on the fact that the complete medical records were not available for review at the time the answer was filed. Plaintiff contends that this denial was in bad faith, and that defendant was estopped from refuting these allegations at trial.

The trial court held that defendant’s denial of the allegations contained in plaintiff’s complaint was made in good faith, and that this did not preclude him from responding to plaintiff’s allegations at trial. The trial court did not abuse its discretion in making this ruling.

This argument is without merit.

NO ERROR.

Judges STEPHENS and McCULLOUGH concur.



**RICHMOND CNTY. BD. OF EDUC. v. COWELL**

[225 N.C. App. 583 (2013)]

RICHMOND COUNTY BOARD OF EDUCATION, PLAINTIFF

v.

JANET COWELL, NORTH CAROLINA STATE TREASURER, IN HER OFFICIAL CAPACITY ONLY, DAVID T. MCCOY, NORTH CAROLINA STATE CONTROLLER, IN HIS OFFICIAL CAPACITY ONLY, ANDY WILLIS, NORTH CAROLINA STATE BUDGET DIRECTOR, IN HIS OFFICIAL CAPACITY ONLY, REUBEN F. YOUNG, SECRETARY OF THE NORTH CAROLINA DEPARTMENT OF PUBLIC SAFETY, IN HIS OFFICIAL CAPACITY ONLY, AND ROY COOPER, ATTORNEY GENERAL OF THE STATE OF NORTH CAROLINA, IN HIS OFFICIAL CAPACITY ONLY, DEFENDANTS

No. COA12-1022

Filed 19 February 2013

**1. Appeal and Error—interlocutory orders and appeals—substantial right—sovereign immunity—standing**

Defendants' first argument in a declaratory judgment action regarding the denial of its motion to dismiss based upon the defense of sovereign immunity affected a substantial right and was thus immediately appealable. However, defendants' second argument based upon the alleged lack of standing of plaintiff to bring the present action was dismissed because it did not affect a substantial right.

**2. Immunity—sovereign immunity—motion to dismiss—redress for constitutional injury—diverting fees from public school funds into general revenue fund**

The trial court did not err in a declaratory judgment case regarding a newly enacted fee under N.C.G.S. § 7A-304(4b) by denying defendants' motion to dismiss the case upon grounds of sovereign immunity. The newly enacted fee collected a penalty in Richmond County and diverted that penalty from Richmond County's public school funds into the general revenue fund of the State. The law in this state does not permit the State to assert sovereign immunity to preclude a plaintiff from seeking redress for an alleged constitutional injury under Article IX, Section 7 of our Constitution.

Appeal by defendants from order entered 23 May 2012 by Judge W. Osmond Smith III, in Wake County Superior Court. Heard in the Court of Appeals 9 January 2013.

## RICHMOND CNTY. BD. OF EDUC. v. COWELL

[225 N.C. App. 583 (2013)]

*George E. Crump, III, for plaintiff appellee.*

*Attorney General Roy Cooper, by Special Deputy Attorney General Hal F. Askins, for defendant appellants.*

McCULLOUGH, Judge.

Defendants appeal from an order of the trial court denying their motion to dismiss the present action upon grounds of sovereign immunity and lack of standing by plaintiff to bring this action. After careful review, we affirm the trial court's denial of defendants' motion to dismiss upon grounds of sovereign immunity, and we dismiss defendants' remaining argument concerning plaintiff's standing to bring this action as interlocutory and not affecting a substantial right of defendants.

I. Background

N.C. Gen. Stat. § 7A-304(a) (2011) enumerates a list of costs that “shall be assessed and collected” in every criminal case “wherein the defendant is convicted, or enters a plea of guilty or nolo contendere, or when costs are assessed against the prosecuting witness[.]” *Id.* In 2011, the North Carolina General Assembly enacted legislation amending N.C. Gen. Stat. § 7A-304(a) to include a provision requiring the collection of the following cost:

To provide for contractual services to reduce county jail populations, the sum of fifty dollars (\$50.00) for all offenses arising under Chapter 20 of the General Statutes and resulting in a conviction of an improper equipment offense, to be remitted to the Statewide Misdemeanor Confinement Fund in the Division of Adult Correction of the Department of Public Safety.

N.C. Gen. Stat. § 7A-304(4b) (2011); *see* 2011 N.C. Sess. Laws 145, § 31.26.(c). This newly enacted provision became effective on 1 July 2011. *See* 2011 N.C. Sess. Laws 145, § 32.6.

On 16 February 2012, plaintiff commenced the present action by filing a complaint for a declaratory judgment against defendants, in their official capacities only, in Wake County Superior Court. Defendants in the present case are executive officers of the State who are involved in the administration of State funds. Plaintiff's complaint alleges that the statutory amendment violates the provisions of Article IX, Section 7 of the North Carolina Constitution because it col-

## RICHMOND CNTY. BD. OF EDUC. v. COWELL

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lects a penalty in Richmond County and diverts that penalty from Richmond County's public school funds into the general revenue fund of the State. Plaintiff seeks a judgment declaring the newly enacted fee to be a penalty and the statutory amendment unconstitutional and requiring that the fees collected pursuant to this statutory amendment be remitted to the Richmond County Board of Education.

On 14 March 2012, defendants filed a motion to dismiss plaintiff's action pursuant to Rules 12(b)(1), 12(b)(2), and 12(b)(6) of the North Carolina Rules of Civil Procedure. Defendants asserted the defense of sovereign immunity and lack of standing by plaintiff as grounds for dismissal of plaintiff's action. On 15 May 2012, plaintiff filed an amended complaint alleging that defendants could not assert sovereign immunity as a defense to plaintiff's direct constitutional claim and that, to the extent a sovereign immunity defense was available, defendants had waived sovereign immunity by the passage of the Declaratory Judgment Act, N.C. Gen. Stat. § 1-253 (2011), and the adoption of the North Carolina Constitution. On 23 May 2012, a hearing was held on defendants' motion to dismiss, and on that same day, the trial court entered an order denying defendants' motion. Defendants gave timely written notice of appeal from the trial court's order to this Court on 18 June 2012.

## II. Interlocutory Nature of Appeal

[1] Defendants appeal from the trial court's denial of their motion to dismiss pursuant to Rules 12(b)(1), 12(b)(2), and 12(b)(6). "The denial of a motion to dismiss is an interlocutory order which is not immediately appealable unless that denial affects a substantial right of the appellant." *Carl v. State*, 192 N.C. App. 544, 550, 665 S.E.2d 787, 793 (2008). "The appealing party bears the burden of demonstrating that the order from which he or she seeks to appeal is appealable despite its interlocutory nature." *Hamilton v. Mortgage Information Services*, \_\_\_ N.C. App. \_\_\_, \_\_\_, 711 S.E.2d 185, 189 (2011) (citing *Jeffreys v. Raleigh Oaks Joint Venture*, 115 N.C. App. 377, 379, 444 S.E.2d 252, 253 (1994)). Thus, the extent to which an appellant is entitled to immediate interlocutory review of the merits of his or her claims depends upon his or her establishing that the trial court's order deprives the appellant of a right that will be jeopardized absent review prior to final judgment. *Id.*; see also *Harbour Point Homeowners' Ass'n, Inc. v. DJF Enters., Inc.*, 206 N.C. App. 152, 157, 697 S.E.2d 439, 444 (2010).

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This Court has consistently held that “[t]he denial of a motion to dismiss based upon the defense of sovereign immunity affects a substantial right and is thus immediately appealable.” *Carl*, 192 N.C. App. at 550, 665 S.E.2d at 793 (quoting *RPR & Assocs. v. State*, 139 N.C. App. 525, 527, 534 S.E.2d 247, 250 (2000)). Therefore, we review the merits of defendants’ sovereign immunity argument on appeal.

However, defendants’ second argument on appeal is not based upon the defense of sovereign immunity but rather addresses the trial court’s denial of their motion to dismiss based upon the alleged lack of standing of plaintiff to bring the present action. “A motion to dismiss a party’s claim for lack of standing is tantamount to a motion to dismiss for failure to state a claim upon which relief can be granted according to Rule 12(b)(6) of the North Carolina Rules of Civil Procedure.” *Pineville Forest Homeowners Ass’n v. Portrait Homes Const. Co.*, 175 N.C. App. 380, 383, 623 S.E.2d 620, 623 (2006) (quoting *Slaughter v. Swicegood*, 162 N.C. App. 457, 464, 591 S.E.2d 577, 582 (2004)). “A trial court’s denial of a Rule 12(b)(6) motion to dismiss generally does not affect a substantial right.” *Carl*, 192 N.C. App. at 550, 665 S.E.2d at 793. Here, defendants have failed to show how the trial court’s denial of their motion to dismiss based upon lack of standing affects a substantial right. “If a party attempts to appeal from an interlocutory order without showing that the order in question is immediately appealable, we are required to dismiss that party’s appeal on jurisdictional grounds.” *Hamilton*, \_\_\_ N.C. App. at \_\_\_, 711 S.E.2d at 189 (citing *Pasour v. Pierce*, 46 N.C. App. 636, 639, 265 S.E.2d 652, 653 (1980) (citing *Waters v. Qualified Personnel, Inc.*, 294 N.C. 200, 210, 240 S.E.2d 338, 344 (1978))). Accordingly, we must dismiss defendants’ standing argument as interlocutory and not affecting a substantial right. See *Anderson v. Town of Andrews*, 127 N.C. App. 599, 601, 492 S.E.2d 385, 386 (1997); *Meherrin Indian Tribe v. Lewis*, 197 N.C. App. 380, 385, 677 S.E.2d 203, 207 (2009).

### III. Standard of Review

The standard of review on appeal from an order denying a motion to dismiss is *de novo*. *Petroleum Traders Corp. v. State*, 190 N.C. App. 542, 546, 660 S.E.2d 662, 664 (2008). Under a *de novo* standard of review, this Court considers the matter anew and freely substitutes its own judgment for that of the trial court. *Id.*

With respect to a motion to dismiss based upon the defense of sovereign immunity, the question before the court is “whether the complaint ‘specifically allege[s] a waiver of governmental immunity.

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Absent such an allegation, the complaint fails to state a cause of action.” ” *Sanders v. State Personnel Comm’n*, 183 N.C. App. 15, 19, 644 S.E.2d 10, 13 (2007) (alteration in original) (quoting *Fabrikant v. Currituck County*, 174 N.C. App. 30, 38, 621 S.E.2d 19, 25 (2005) (quoting *Paquette v. County of Durham*, 155 N.C. App. 415, 418, 573 S.E.2d 715, 717 (2002))). “ ‘[P]recise language alleging that the State has waived the defense of sovereign immunity is not necessary,’ but, rather, the complaint need only ‘contain[] sufficient allegations to provide a reasonable forecast of waiver.’ ” *Id.* (second alteration in original) (quoting *Fabrikant*, 174 N.C. App. at 38, 621 S.E.2d at 25). The question is, therefore, whether plaintiff’s complaint contains sufficient allegations to support a finding of waiver of sovereign immunity.

IV. Sovereign Immunity

[2] “ ‘As a general rule, the doctrine of governmental, or sovereign immunity bars actions against, *inter alia*, the state, its counties, and its public officials sued in their official capacity.’ ” *Petroleum Traders*, 190 N.C. App. at 546, 660 S.E.2d at 664 (quoting *Herring v. Winston-Salem/Forsyth County Bd. of Educ.*, 137 N.C. App. 680, 683, 529 S.E.2d 458, 461 (2000) (quoting *Messick v. Catawba County*, 110 N.C. App. 707, 714, 431 S.E.2d 489, 493 (1993))). “Thus, ‘a state may not be sued . . . unless it has consented by statute to be sued or has otherwise waived its immunity from suit.’ ” *Id.* (ellipsis in original) (quoting *Battle Ridge Cos. v. N.C. Dep’t of Transp.*, 161 N.C. App. 156, 157, 587 S.E.2d 426, 427 (2003)).

In the present case, defendants are state officials sued in their official capacity. As they contend on appeal, defendants have not expressly waived sovereign immunity. Defendants further contend that there is no statutory waiver applicable to plaintiff’s claim and that the common law waiver of sovereign immunity identified by our Supreme Court in *Corum v. University of North Carolina*, 330 N.C. 761, 413 S.E.2d 276 (1992), does not apply to plaintiff’s claim in the present case. We disagree.

In *Corum*, our Supreme Court held that “[t]he doctrine of sovereign immunity cannot stand as a barrier to North Carolina citizens who seek to remedy violations of their rights guaranteed by the Declaration of Rights [of our Constitution].” *Id.* at 785-86, 413 S.E.2d at 291. Our Supreme Court reasoned that

individual rights protected under the Declaration of Rights from violation by the State are constitutional

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rights. Such constitutional rights are a part of the supreme law of the State. On the other hand, the doctrine of sovereign immunity is not a constitutional right; it is a common law theory or defense established by this Court . . . . Thus, when there is a clash between these constitutional rights and sovereign immunity, the constitutional rights must prevail.

*Id.* at 786, 413 S.E.2d at 291-92 (citation omitted). Following *Corum*, in *Peverall v. County of Alamance*, 154 N.C. App. 426, 573 S.E.2d 517 (2002), this Court noted that “[i]t is well established that sovereign immunity does not protect the state or its counties against claims brought against them directly under the North Carolina Constitution.” *Id.* at 430, 573 S.E.2d at 519. In *Sanders v. State Personnel Comm’n*, 183 N.C. App. 15, 644 S.E.2d 10 (2007), this Court again held that “sovereign immunity is not available as a defense to a claim brought directly under the state constitution.” *Id.* at 18, 644 S.E.2d at 12.

However, relying on this Court’s opinion in *Petroleum Traders Corp. v. State*, 190 N.C. App. 542, 660 S.E.2d 662 (2008), defendants argue that the holding in *Corum* does not apply to plaintiff’s action in the present case because plaintiff’s action arises under Article IX, rather than Article I, of our Constitution. In *Petroleum Traders*, we noted that “[o]ur appellate courts have applied the holding of *Corum* to find a waiver of sovereign immunity only in cases wherein the plaintiff alleged a violation of a right protected by the Declaration of Rights.” *Id.* at 548, 660 S.E.2d at 665. Our opinion in *Petroleum Traders* distinguished the holdings in *Sanders* and *Peverall*, noting that the plaintiffs in those cases, as in “every other case waiving sovereign immunity based on *Corum*,” alleged a violation of a right protected by the Declaration of Rights. *Id.* at 550, 660 S.E.2d at 666. We further noted that “*Corum* contains no suggestion of an intention to eliminate sovereign immunity for any and all alleged violations of the N.C. Constitution.” *Id.* at 551, 660 S.E.2d at 667. Accordingly, we concluded in *Petroleum Traders* that “*Corum* is properly limited to claims asserting violation of the plaintiff’s personal rights as set out in the N.C. Constitution Declaration of Rights.” *Id.* at 551, 660 S.E.2d at 667.

First, we note that the plaintiff in *Petroleum Traders* alleged a violation of Article II, Section 23 of our Constitution, which “articulates procedural rules for the passage of a revenue or tax bill[.]” *Petroleum Traders*, 190 N.C. App. at 547, 660 S.E.2d at 665. As we observed in *Petroleum Traders*, Article II, Section 23 of our

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Constitution “does not articulate any rights, only procedures to be followed.” *Id.* Such is not the case here. In the present case, plaintiff asserts a violation by the State of Article IX, Section 7 of our Constitution, which gives public schools of the several counties the right to “the clear proceeds of all penalties and forfeitures and of all fines collected in the several counties for any breach of the penal laws of the State[.]” N.C. Const. art. IX, § 7. Thus, the constitutional provision at issue in the present case does articulate a right to certain monies belonging to the counties to be “faithfully appropriated and used exclusively for maintaining free public schools.” *Id.*

Second, defendants ignore that subsequent to this Court’s decision in *Petroleum Traders*, our Supreme Court again addressed the issue of waiver of sovereign immunity as against constitutional claims in *Craig v. New Hanover Cty. Bd. of Educ.*, 363 N.C. 334, 678 S.E.2d 351 (2009). In *Craig*, our Supreme Court stated, “This Court could hardly have been clearer in its holding in *Corum*: ‘[I]n the absence of an adequate state remedy, one whose state constitutional rights have been abridged has a direct claim against the State under our Constitution.’” *Id.* at 338, 678 S.E.2d at 354 (quoting *Corum*, 330 N.C. at 782, 413 S.E.2d at 289). Our Supreme Court emphasized that *Corum* “clearly establish[ed] the principle that sovereign immunity could not operate to bar direct constitutional claims.” *Id.* at 340, 678 S.E.2d at 356. In *Craig*, our Supreme Court allowed the plaintiff to proceed on his “constitutional claims,” *id.* at 342, 678 S.E.2d at 357 (emphasis added), including not only two claims under Article I, but also one claim under Article IX of our Constitution. *Id.* at 335, 678 S.E.2d at 352. Our Supreme Court expressed that “[t]o hold otherwise would be contrary to our opinion in *Corum* and inconsistent with the spirit of our long-standing emphasis on ensuring redress for every constitutional injury.” *Id.* at 342, 678 S.E.2d at 357. Notably, our Supreme Court did not hold that the defendant’s assertion of sovereign immunity in *Craig* barred the plaintiff’s Article IX claim.

Indeed, our Courts have long entertained claims under Article IX, Section 7, such as that involved in the present case, by plaintiffs against the State. *See, e.g., Craven County Bd. of Education v. Boyles*, 343 N.C. 87, 468 S.E.2d 50 (1996) (action by Craven County Board of Education against State officials seeking declaratory judgment that under Article IX, Section 7 of our Constitution, Board was entitled to clear proceeds of civil penalty paid by company to State for violations of environmental laws); *Shavitz v. City of High Point*, 177 N.C. App. 465, 630 S.E.2d 4 (2006) (action by Guilford County

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Board of Education against City of High Point seeking declaratory judgment that under Article IX, Section 7 of our Constitution, Board was entitled to clear proceeds of penalties collected by City's red light camera program), *appeal dismissed, disc. review denied*, 361 N.C. 430, 648 S.E.2d 845 (2007); *N.C. School Bds. Ass'n v. Moore*, 160 N.C. App. 253, 258, 585 S.E.2d 418, 422 (2003) (declaratory judgment action filed by multiple local school boards against chief executive officers of various State departments, agencies, institutions, and licensing boards seeking "a determination that various monetary payments collected by defendants are 'penalties and forfeitures' or 'fines collected . . . for . . . breach of the penal laws of the State' belonging to the public schools 'in the several counties' under Article IX, Section 7." (ellipses in original)), *aff'd in part, rev'd in part*, 359 N.C. 474, 614 S.E.2d 504 (2005); *Cauble v. City of Asheville*, 66 N.C. App. 537, 311 S.E.2d 889 (1984) (class action by citizens, residents, and taxpayers of the City of Asheville contending clear proceeds of fines collected pursuant to City's ordinances forbidding overtime parking were owed to county school board under Article IX, Section 7 of our Constitution), *aff'd*, 314 N.C. 598, 336 S.E.2d 59 (1985).

In light of this line of cases allowing constitutional claims to proceed against the State under Article IX of our Constitution, we have likewise uncovered no case in which a plaintiff's Article IX constitutional claim was barred by the defense of sovereign immunity. Moreover, in reviewing the merits of the plaintiff school boards' claims in these cases, neither this Court nor our Supreme Court has acknowledged the possibility that sovereign immunity might bar the plaintiffs' constitutional action under Article IX, Section 7. We see no meaningful difference in the claims asserted by these plaintiffs and the plaintiff's claim in the present case.

As this Court has previously recognized, "[t]he North Carolina General Assembly is clearly without power to appropriate or divert by statute all or any part of fines resulting from violations of city ordinances to cities and towns, this being in direct contravention of the constitutional provision." *Cauble*, 66 N.C. App. at 541, 311 S.E.2d at 892. Thus, "[i]n accordance with North Carolina authority, it is generally true that where a state constitution gives the clear proceeds of fines to public schools, any statute which purports to divert the total proceeds derived from a particular type of fine to any other purpose will be held unconstitutional." *Id.* at 542, 311 S.E.2d at 893. Here, as in *Craig*, were we to hold that the defense of sovereign immunity bars plaintiff's direct constitutional claim under Article IX, Section 7,



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plaintiff would be left without a remedy to redress the alleged constitutional injury to its rights thereunder. *Craig*, 363 N.C. at 341, 678 S.E.2d at 356 (“If plaintiff is not allowed to proceed . . . with his direct colorable constitutional claim, sovereign immunity will have operated to bar the redress of the violation of his constitutional rights, contrary to the explicit holding of *Corum*.”).

Given the long line of cases in North Carolina allowing local boards of education to pursue constitutional claims under Article IX, Section 7 against the State and its agencies as described herein, and in light of our Supreme Court’s holding in *Craig* allowing a plaintiff to pursue an Article IX claim in addition to his Article I claims despite the defendants’ assertion of sovereign immunity, we hold plaintiff in the present case has sufficiently alleged a common law waiver of sovereign immunity by the State under the principle established by our Supreme Court in *Corum* for plaintiff’s direct Article IX constitutional claim. Accordingly, the trial court properly denied defendants’ motion to dismiss plaintiff’s action.

#### V. Conclusion

We affirm the trial court’s denial of defendants’ motion to dismiss plaintiff’s action on grounds of sovereign immunity. Plaintiff’s complaint sufficiently alleges that defendants have judicially waived the defense of sovereign immunity for plaintiff’s direct constitutional claim under Article IX, Section 7 of our Constitution according to the principle established by our Supreme Court in *Corum* and reiterated by our Supreme Court in *Craig*. The law in this state does not permit the State to assert sovereign immunity to preclude a plaintiff from seeking redress for an alleged constitutional injury under Article IX, Section 7 of our Constitution.

We dismiss defendants’ remaining argument addressing plaintiff’s lack of standing to bring the present action, as defendants have failed to show how the trial court’s denial of their motion to dismiss on that basis affects a substantial right warranting immediate appellate review.

Affirmed in part, dismissed in part.

Judges STEELMAN and STEPHENS concur.

**STATE v. CHISHOLM**

[225 N.C. App. 592 (2013)]

STATE OF NORTH CAROLINA

v.

ZAVIER CHARLES CHISHOLM

No. COA12-901

Filed 19 February 2013

**1. Drugs—possession with intent to sell or deliver counterfeit controlled substance—motion to dismiss—sufficiency of evidence**

The trial court did not err by denying defendant's motion to dismiss the charge of possession with the intent to sell or deliver a counterfeit controlled substance. The evidence was sufficient to establish one of three statutory factors defining a counterfeit controlled substance and to provide an inference of defendant's intent to sell or deliver.

**2. Drugs—possession with intent to sell or deliver cocaine—motion to dismiss—sufficiency of evidence—constructive possession**

The trial court did not err by denying defendant's motion to dismiss the charge of possession with the intent to sell or deliver cocaine. There was sufficient evidence of incriminating factors to support constructive possession.

**3. Evidence—officer testimony—drugs—defendant's bedroom—sole control—similar evidence previously admitted**

The trial court did not err in a drugs case by admitting the testimony of an officer that the room in which the drugs were found was solely controlled by defendant. Where testimony had been previously admitted referring to a bedroom as defendant's bedroom, defendant could not show that he was prejudiced.

Appeal by defendant from judgment entered 12 October 2011 by Judge Richard D. Boner in Mecklenburg County Superior Court. Heard in the Court of Appeals 30 January 2013.

*Attorney General Roy Cooper by Special Deputy Attorney General James M. Stanley, Jr. for the State.*

*Appellate Defender Staples S. Hughes by Assistant Appellate Defender Constance E. Widenhouse for defendant-appellant.*

STEELMAN, Judge.

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Where evidence was sufficient to establish one of three statutory factors defining a counterfeit controlled substance and to provide an inference of defendant's intent to sell or deliver, the trial court properly denied defendant's motion to dismiss the charge of possession with the intent to sell or deliver a counterfeit controlled substance. Where there was sufficient evidence of incriminating factors to support constructive possession, the trial court properly denied defendant's motion to dismiss the charge of possession with the intent to sell or deliver cocaine. Where testimony had been previously admitted referring to a bedroom as "defendant's bedroom," defendant could not show that he was prejudiced when the trial court overruled his objection to an officer's testimony that the room was "solely controlled" by defendant.

**I. Factual and Procedural Background**

On 26 April 2010, police executed a search warrant for 3036 Chenango Drive in Charlotte and found what appeared to be controlled substances in Xavier Charles Chisholm's (defendant) bedroom. Defendant was in the room sleeping when police arrived. His girlfriend and his dog were also in the bedroom. When police searched the bedroom, they found razors, crack pipes, spoons, plastic baggies, an electronic scale containing white residue, \$600 in cash, and substances that appeared to be controlled substances. Police found two baggies containing white substances, one inside the box springs of the bed and the other inside a duffel bag, which was leaning against the nightstand. Analysis of the substances indicated that the substance found in the box springs consisted of 13.60 grams of cocaine. The other white powder found in the duffel bag weighed 28.60 grams, but did not contain a controlled substance.

Defendant was indicted for possession of drug paraphernalia, possession with the intent to sell or deliver cocaine, possession with the intent to sell or deliver a counterfeit controlled substance, and being an habitual felon. On 12 October 2011, a jury found defendant guilty of all offenses, including being an habitual felon. Defendant was sentenced as a Level V offender to two active terms of imprisonment of 101-131 months for possession with the intent to sell or deliver a counterfeit controlled substance and 101-131 months for possession of drug paraphernalia and possession with the intent to sell or deliver cocaine. The two sentences ran concurrently.

Defendant appeals.

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**II. Denial of Defendant's Motions to Dismiss**

In his first and second arguments, defendant contends that the trial court erred in denying his motions to dismiss the charge of possession with the intent to sell or deliver a counterfeit controlled substance and the charge of possession with the intent to sell or deliver cocaine. We disagree.

**A. Standard of Review**

"The denial of a motion to dismiss for insufficient evidence is a question of law which this Court reviews *de novo*." *State v. Bagley*, 183 N.C. App. 514, 526, 644 S.E.2d 615, 623 (2007) (citations omitted). "Upon defendant's motion for dismissal, the question for this Court is whether there is substantial evidence (1) of each essential element of the offense charged, or of a lesser offense included therein, and (2) of defendant's being the perpetrator of such offense. If so, the motion is properly denied." *State v. Powell*, 299 N.C. 95, 98, 261 S.E.2d 114, 117 (1980). "Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *State v. Smith*, 300 N.C. 71, 78-79, 265 S.E.2d 164, 169 (1980). We view the evidence in the light most favorable to the State and any conflicts are resolved in the State's favor. *State v. Fowler*, 353 N.C. 599, 621, 548 S.E.2d 684, 700 (2001). "If substantial evidence exists supporting defendant's guilt, the jury should be allowed to decide if the defendant is guilty beyond a reasonable doubt." *Id.*

**B. Counterfeit Controlled Substance**

[1] "[T]o obtain a conviction of possession with intent to sell and deliver a counterfeit controlled substance, the State must prove (1) that defendant possessed a counterfeit controlled substance, and (2) that defendant intended to 'sell or deliver' the counterfeit controlled substance." *State v. Williams*, 164 N.C. App. 638, 644, 596 S.E.2d 313, 317 (2004). Defendant challenges the sufficiency of the evidence under both elements.

Under the North Carolina General Statutes, a "counterfeit controlled substance" is defined as:

Any substance which is by any means intentionally represented as a controlled substance. It is evidence that the substance has been intentionally misrepresented as a controlled substance if the following factors are established:

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1. The substance was packaged or delivered in a manner normally used for the illegal delivery of controlled substances.
2. Money or other valuable property has been exchanged or requested for the substance, and the amount of that consideration was substantially in excess of the reasonable value of the substance.
3. The physical appearance of the tablets, capsules or other finished product containing the substance is substantially identical to a specified controlled substance.

N.C. Gen. Stat. § 90-87(6)(b)(2011). Defendant contends that for a substance to be considered a counterfeit controlled substance, the State must prove all three factors under the statute. However, this reading of the statute is incorrect. *See State v. Bivens*, 204 N.C. App. 350, 354, 693 S.E.2d 378, 381 (2010) (holding that jury instructions omitting one part of a statutory factor were not misleading because “the statute clearly states that ‘[i]t is *evidence* that the substance has been intentionally misrepresented as a controlled substance if the following factors are established[,]’ not that those factors are required to find that a controlled substance has been intentionally misrepresented.”). The statute does not require the State to prove all three elements. *See id.*

To establish the second element of intent to sell or deliver, the “amount of the substance found, the manner in which it was packaged and the presence of other packaging materials” give rise to an inference of defendant’s intent to sell or deliver. *State v. Baxter*, 285 N.C. 735, 738, 208 S.E.2d 696, 698 (1974).

In the instant case, there was substantial evidence supporting the defendant’s possession of a counterfeit controlled substance under the first statutory factor and his intent to sell or deliver the substance. The evidence, taken in the light most favorable to the State, showed: the duffel bag was leaning against the nightstand, and inside the duffel bag, police found 28.6 grams of a white substance, plastic baggies, a razor blade, and a Brillo pad, an item used for consuming cocaine. The evidence also showed that the white powder was packaged in a knotted plastic baggie, the manner of packaging was consistent with the manner in which cocaine is typically packaged, and the weight of the substance was consistent with the weight in which cocaine is sold. The packaging, the weight of the substance, and the

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presence of other materials used for the packaging of narcotics were substantial evidence supporting the submission of the issues of whether the substance was a counterfeit controlled substance and whether defendant had the intent to sell or deliver the substance to the jury.

This argument is without merit.

**C. Constructive Possession**

[2] To obtain a conviction for possession of a controlled substance with the intent to sell or deliver, “the State has the burden of proving: (1) [d]efendant possessed the controlled substance, and (2) with the intent to sell or distribute it.” *State v. Bowens*, 140 N.C. App. 217, 222, 535 S.E.2d 870, 873 (2000); *see also* N.C. Gen. Stat. § 90-95(a)(1)(2011). Defendant contends that there was insufficient evidence to prove he had actual or constructive possession of the cocaine.

“The State is not required to prove actual physical possession of the controlled substance or paraphernalia; proof of constructive possession by the defendant is sufficient to carry the issue to the jury and such possession need not be exclusive.” *State v. McBride*, 173 N.C. App. 101, 106, 618 S.E.2d 754, 758 (2005). “Where such materials are found on the premises under the control of an accused, this fact, in and of itself, gives rise to an inference of knowledge and possession which may be sufficient to carry the case to the jury on a charge of unlawful possession.” *State v. Harvey*, 281 N.C. 1, 12, 187 S.E.2d 706, 714 (1972). When an accused does not have exclusive possession of the premises where narcotics are found, “the State must show other incriminating circumstances before constructive possession may be inferred.” *State v. Davis*, 325 N.C. 693, 697, 386 S.E.2d 187, 190 (1989).

In *Davis*, officers executing a search warrant for a mobile home found seven adults in the living room, including the defendant, and controlled substances throughout the premises. *Id.* at 694-95, 386 S.E.2d at 188-89. Our Supreme Court upheld the trial court’s denial of defendant’s motion to dismiss the charges of trafficking in methadone and cocaine, holding that the “evidence was sufficient to provide the other incriminating circumstances necessary for constructive possession when the possession is nonexclusive.” *Id.* at 694, 697, 386 S.E.2d at 188, 190. The incriminating circumstances included: “a bill of sale to a mobile home which matched the description of the mobile home being searched,” “[t]he name on the bill of sale was that of Grayson Davis, the defendant,” “a bottle of prescription drugs with the name

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of Grayson Davis was found on a coffee table beside the chair defendant was sitting in when the officers arrived,” and white tablets found “in the pockets of [defendant] and on the chair where he had been sitting.” *Id.* at 697-98, 386 S.E.2d at 190. Our Supreme Court also emphasized “the defendant’s presence in the mobile home,” defendant’s acceptance of the search warrant without protest, and the testimony received without objection referring to the mobile home as “Grayson Davis’ residence.” *Id.* at 699, 386 S.E.2d at 191.

In the instant case, because the State did not show that defendant had exclusive possession of the bedroom, there must be “other incriminating circumstances sufficient for the jury to find that defendant had constructive possession of the narcotics[.]” *Id.* at 697, 386 S.E.2d at 190. The evidence, taken in the light most favorable to the State, shows: defendant was sleeping in the bed in the bedroom where drugs were found, defendant’s dog was in the bedroom with him, defendant’s clothes were in the closet, plastic baggies, drug paraphernalia, and an electronic scale containing white residue were also in the bedroom. The nightstand contained a wallet, which contained a Medicare Health Insurance Card and customer service card identifying defendant, a letter addressed to defendant at 3036 Chenango Drive, and \$600 in cash. While police found a backpack containing women’s clothes in the room, it did not contain any drugs, drug paraphernalia, or drug packaging materials, and it was found near the door. Other than that backpack, there were no other female items in the room. On several occasions the bedroom was referred to as “defendant’s bedroom” or “Zavier’s room” and defendant did not object to this testimony. This evidence constituted other incriminating circumstances sufficient to support the submission of the possession with the intent to sell or deliver cocaine charge to the jury under the theory of constructive possession.

This argument is without merit.

### III. Lay Opinion Testimony

[3] In his third argument, defendant contends that the trial court erred in admitting the testimony of Officer Pogue that the room in which the drugs were found was “solely controlled” by defendant. We disagree.

#### A. Standard of Review

When there has been an error committed by the trial court, the test for prejudicial error in matters not affecting constitutional rights

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is whether “there is a reasonable possibility that, had the error in question not been committed, a different result would have been reached at the trial out of which the appeal arises.” N.C. Gen. Stat. § 15A-1443(a)(2011); *see also State v. Gardner*, 316 N.C. 605, 613, 342 S.E.2d 872, 877 (1986).

**B. Analysis**

In the instant case, defendant objected to Officer Pogue’s testimony that the “room was solely controlled by [defendant].” The transcript indicates that similar evidence had been previously admitted without objection. Prior to Officer Pogue’s testimony, Officer Knaff was asked without objection if “defendant’s bedroom” was the one that was locked and whether he saw the defendant when he entered “defendant’s bedroom.” Officer Knaff also testified without objection that his “area of responsibility for the search was not Zavier’s room.” Officer Pogue testified without objection that “Zavier and Carmen were found in his bedroom,” a photo was taken from “defendant’s bedroom,” and certain items were “seized out of Zavier Chisholm, the defendant’s bedroom.”

Even assuming *arguendo* that the trial court erred in overruling defendant’s objection to Officer Pogue’s testimony that the room was “solely controlled” by defendant, based upon the previous testimony that was received without objection, defendant cannot show prejudice. Therefore, we do not reach defendant’s argument that the lay opinion testimony was improper.

This argument is without merit.

NO ERROR.

Judges McGEE and HUNTER, JR., Robert N. concur.



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[225 N.C. App. 599 (2013)]

STATE OF NORTH CAROLINA, PLAINTIFF

v.

MICHAEL DORMAN, II, DEFENDANT

No. COA12-97

Filed 19 February 2013

**1. Appeal and Error—State’s appeal of dismissal in criminal action—jeopardy not attached**

The Court of Appeals had jurisdiction over the State’s appeal from the dismissal of a first-degree murder prosecution where the dismissal occurred before trial, so that jeopardy had not attached.

**2. Constitutional Law—due process—destruction of evidence—potential rather than actual prejudice—bad faith required**

In an appeal by the State from the dismissal of a first-degree murder prosecution where the bones on which identification of the victim was based had been returned to the family and cremated, defendant could not meet his burden of demonstrating that the evidence was actually, as opposed to potentially, material and favorable to the defense. Defendant could only demonstrate a violation of due process under *Brady v. Maryland*, 373 U.S. 83, by the presence of bad faith by the State.

**3. Constitutional Law—criminal discovery—destruction of evidence—bad faith—pretrial determination—premature**

In an appeal by the State from the dismissal of a first-degree murder prosecution, the Court of Appeals held that the trial court was premature in concluding before trial that a bad faith constitutional violation (not preserving the bones used to identify the victim) caused such irreparable harm to defendant’s case that dismissal was the only appropriate remedy. Defendant had not yet engaged an expert, had not attempted to test the bones that were preserved, and had not attempted to replicate the identification of the victim using radiographs of her teeth.

**4. Constitutional Law—criminal discovery—pretrial determination of violation**

The trial court erred by concluding that defendant’s rights were flagrantly violated under *Brady v. Maryland*, 373 U.S. 83, by the State’s failure to produce certain information before a pre-trial hearing. Defendant came into possession of the information with ample opportunity to make effective use of it.

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**5. Criminal Law—discovery—withheld information—pretrial**

The trial court erred in its reliance on *Napue v. Illinois*, 360 U.S. 264, in dismissing a first-degree murder prosecution before trial for a discovery violation. *Napue* involved a conviction obtained by the knowing use of false evidence, while there had been no trial and no conviction in this case.

**6. Constitutional Law—Eighth Amendment—discovery violation—pretrial detention**

The trial court's conclusion that there was an Eighth Amendment violation in a first-degree murder prosecution from the State's failure to disclose information was not supported by a precise legal or factual basis in its order dismissing the case.

**7. Criminal Law—discovery—dismissal as sanction—basis not specified**

The trial court abused its discretion by dismissing a first-degree murder prosecution with prejudice as a discovery sanction where the basis for determining that dismissal was appropriate could not be determined. The dismissal occurred before defendant pled guilty or proceeded to trial; moreover, defendant was given possession of the information before trial.

**8. Criminal Law—discovery—no duty to create document—defendant in possession of information before trial**

Discovery sanctions short of dismissal in a first-degree murder prosecution were vacated because the State had no duty to create or continue to develop documentation regarding an investigation, and because defendant was in possession of the relevant information well before trial.

Appeal by the State from order entered 14 November 2011 by Judge Orlando F. Hudson, Jr., in Durham County Superior Court. Heard in the Court of Appeals 27 September 2012.

*Attorney General Roy Cooper, by Special Deputy Attorney General Robert C. Montgomery, for the State.*

*Glover & Petersen, P.A., by Ann B. Petersen and James R. Glover, for defendant-appellee.*

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*National Crime Victim Law Institute and National Association of Crime Victim Compensation Boards, by John G. Barnwell, Margaret Garvin, and Alison Wilkinson, Amicus Curiae.*

HUNTER, JR., Robert N., Judge.

The State appeals from an order entered 14 November 2011 granting Michael Dorman II's ("Defendant") Motion to Dismiss the charge of first-degree murder that had been lodged against him. The trial court also ordered the suppression of certain evidence at "any and all future proceedings in the matter" as an additional sanction for the State's violation of discovery provisions. On appeal, the State argues the trial court erred in: (1) making certain findings of fact which were unsupported by the evidence presented; (2) concluding on the basis of those findings that the State flagrantly violated Defendant's constitutional rights and statutory right to discovery; and (3) concluding dismissal with prejudice was the "only appropriate remedy" for these constitutional and statutory violations. After consideration of the State's arguments and review of the record and applicable law, we reverse the portion of the trial court's order granting Defendant's Motion to Dismiss. We also vacate the trial court's order imposing discovery sanctions against the State. These decisions are to be revisited by the trial judge after receipt of additional evidence as discussed herein.

**I. Factual and Procedural Background****A. Defendant's Arrest**

In March 2008, Lakeia Boxley's ("Ms. Boxley") mother reported to the Durham Police Department that her daughter was missing. Latifah White, Ms. Boxley's sister and a resident of South Carolina, filed a second missing persons report in January 2010 with the Durham Police Department.

In July 2010, more than two years after the first missing persons report, one of Defendant's friends called the Orange County Sheriff's Department. The friend, identified as "Mr. Bryant" in the record, called and reported that Defendant claimed to be in possession of some human bones. On 14 July 2010, Orange County Sheriff's Investigator Tony White was asked to follow up on this tip, and interviewed Mr. Bryant. Mr. Bryant told Investigator White that Defendant confided in him that approximately two years earlier he had met a young woman in Durham who helped him obtain crack cocaine on a

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few occasions. Defendant allegedly told Mr. Bryant that he asked this woman to have sex with him, and when she refused, he put a sawed-off shotgun to the woman's head, where it accidentally went off. According to Mr. Bryant, Defendant admitted to having kept her bones hidden in his father's house ever since.

Later that same day, Investigator White had Mr. Bryant arrange a meeting with Defendant at Defendant's home. There, Investigator White witnessed Defendant hand over a book bag to Mr. Bryant. After the bag was seized, it was opened at the Sheriff's Office. Inside the bag were bones Investigator White believed to be "the top of [a] skull . . . [an] eye portion . . . a couple rib bones, a femur, and . . . miscellaneous other broken-up bones." Photographs were taken and sent to an archeologist, Dr. Oliver, who opined that the bones were human remains. The bones themselves were sent to the Office of the Chief Medical Examiner ("OCME"), who received the bones either that same day or the next, 15 July 2010. Defendant was arrested on a charge of concealing and failing to report a death. Durham County Public Defender Lawrence Campbell was assigned as Defendant's counsel on 16 July 2010.

***B. Autopsy and Medical Evaluation***

While the OCME was in possession of the bones, the Durham Police Department provided the OCME with a synopsis of the investigation up to that point, including their suspicion that the victim was Ms. Boxley. Upon receipt of the bones, Chief Medical Examiner Deborah Radisch assigned the case to Dr. Jonathan Privette, who performed an autopsy on 15 July 2010. Photographs of the bones, which did not amount to a complete skeleton, were taken. In addition, a CT scan of Ms. Boxley's head and teeth was compared to the lower jaw bone, and radiographs were made of that jaw bone. X-rays of the spinal column were also compared to Ms. Boxley's chest x-rays. Dr. Privette identified the bones as those of Ms. Boxley based upon a comparison of the ante- and post-mortem radiographs of the jaw bone and the jaw bone itself.

In addition, Dr. Privette's autopsy report noted that a small portion of the skull "exhibit[ed] multiple discrete, small, gray, generally round discolorations . . . consistent with impact and wipe-off from small metal projectiles or extended surface contact with small metallic objects." In his autopsy report, Dr. Privette indicated that "[b]ased on the history and investigative findings, it is my opinion that the cause of death in this case is undetermined homicidal violence, with

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findings suggestive of blunt head trauma consistent with a shotgun wound.” Although the autopsy report was dated 15 July 2010, the OCME did not document in its internal records that Dr. Privette had identified the remains as those of Ms. Boxley until 29 July 2010. On 21 September 2010, the OCME released most of the bones in its possession, including the jaw bone used in making the identification, to a mortuary in Durham. However, the OCME did not release all of the bones, retaining the small portion of the skull that possessed the round discolorations. The bones that were released were cremated on either 22 or 23 September 2010, and Ms. White received her sister’s ashes on 24 September 2010.

From the time of his arrest until 14 September 2010, Defendant remained incarcerated on the concealing a death charge. On 5 August 2010, the State moved for and received an order committing Defendant to Dorothea Dix Hospital for an evaluation of his capacity to proceed. In its motion, the State requested Defendant undergo an evaluation in light of concerns about his mental health. The State explained that:

Defendant indicated that he found some human bones one day. The next day he got some rubber gloves[,] went back to get the bones[,] and then brought them home. He used the bones for sexual gratification.

When question [sic] by law enforcement officers he indicated that he preferred to be called by another name. He stated that he did tell his friend that he had killed a woman but that was just a fantasy to kill someone.

Based upon the conversation the defendant had with a friend about murder, his admission to law enforcement that he does fantasize about murder, his admission of using bones for sexual gratification, and his mannerism[s] when questioned by law enforcement, the State questions this defendant’s capacity to proceed at this time and request[s] an evaluation be ordered.

Defendant was received at Dorothea Dix on 14 September 2010. An evaluation of Defendant revealed that he had been suffering from hallucinations while incarcerated, including visions of “spots mov[ing] on the floor of his cell.” Defendant also reported feeling as though “someone [was] looking at [him,] through [him] to [his] cell, and [that] it was pure evil.” Defendant also believes he is a woman trapped in a man’s body, desires gender re-assignment surgery, and

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prefers to be called “Sarah Ann.” He described becoming sexually aroused by violent novels and movies, and claimed to spend a couple of hours every night viewing these materials. Doctors at Dorothea Dix diagnosed Defendant with Mood Disorder, Sexual Disorder, Gender Identity Disorder, Personality Disorder, and Borderline Intellectual Functioning, but were of the opinion that Defendant was “capable of proceeding to trial.” Defendant was discharged from Dorothea Dix on 21 October 2010, after completion of the evaluation, and was returned to the custody of the Durham County Jail.

***C. Indictment and Discovery***

While he was undergoing evaluation at Dorothea Dix, the Durham County grand jury indicted Defendant for one count of first degree murder on 7 September 2010. On 15 October 2010, the Durham County District Attorney’s Office voluntarily dismissed the concealment of a death charge that had been pending against Defendant.

On 16 September 2010 Mr. Campbell filed a Motion to Preserve Evidence and a Request for Voluntary Discovery. A Motion for Discovery was filed on 17 September 2010. The Motion to Preserve Evidence requested the entry of an order directing the State “to preserve and retain intact and not to destroy or alter any evidence, tangible . . . object, or other information relating in any manner to this case.” The Motion to Preserve did not specifically mention human remains.

On 7 October 2010, during the morning session of Durham County Superior Court, Mr. Campbell was informed by Judge Kenneth Titus that District Attorney Tracey Cline had unilaterally moved Defendant’s case from that day’s court date to the next case management session, which was to be held on 4 November 2010. Mr. Campbell noted that he had not yet received any discovery in the case, and requested to be heard on the Motion to Preserve Evidence he had filed. The following exchange took place in open court later that afternoon between Mr. Campbell, District Attorney Cline, and Judge Titus:

MR. CAMPBELL: Judge, this is a case involving some human remains. Originally the charge was failure to report a death, the allegation against my client—who is in Raleigh at Dorothea Dix at this time . . . was that he was concealing some human remains and had been for some period of time. Since [then], Ms. Cline obtained an indictment charging him with murder. There have been . . . averments or allegations made from the state that

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they have been able to, through some scientific methods, to not only ascertain the identity of those human remains, but that they've also been able to . . . determine how that person died. And so we would consider that to be the subject matter of this entire lawsuit and would argue that that is very critical evidence.

If you'll note in the file, Judge, there should be a motion that was filed on . . . September the 16th of this year, a motion to preserve evidence and within that, of course, we did not list human remains but we asked that all the evidence be preserved. My purpose for being heard today was . . . to be sure that the evidence, that is the human remains that are the subject matter of this lawsuit, would be preserved so that they would be available for independent testing by the defendant. Ms. Cline then informed me this morning that the remains are no longer in law enforcement custody, that they have been, in fact, returned to a family and that those remains have been buried. I would argue that there's no way this case can proceed without us being able to have access to that evidence.

MS. CLINE: Judge, I learned . . . this morning that Mr. Campbell wanted the state to preserve what was left of the body of the victim in this matter. And when I learned of that, I indicated to Mr. Campbell that I knew that the bones had been returned to the family but I would call the medical examiner and the investigation agency [and see] what had been preserved as it relates to this order, since I too was concerned about the cause of death. So the medical examiner, it preserved the portion of her skull that appeared to [be] consistent with being shot with a gunshot wound. However, the other bone fragments were . . . returned to the family and buried but they did preserve the portion of the skull that the state contends is consistent with being shot . . . with a shotgun.

. . . .

If the defense thinks it's necessary to exhume the other portions of the body . . . they have been buried by the family.

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I have not called the family myself to verify that since I learned of this this morning but I can do that and at the next court hearing I will have that information, but I do know that they have preserved the portion of the skull that testing was done on to determine whether or not she was shot with a shotgun. That's what I can tell the Court and Mr. Campbell at this time.

MR. CAMPBELL: Judge, again, I don't think that satisfies our obligations to my client. I am not—I'm certainly not a pathologist or forensic expert of any kind, but we're going to have to have someone identify this person. This is some remains that I am told were possibly as long as two years old. And they need to be identified and we need to be able to run whatever other tests, I have no discovery so far, so I don't know what tests have been performed, I don't know what tests I'm going to have to refute, but it's my position that we would be entitled to the evidence.

THE COURT: Well, we'll hold off on the exhumation of the body because if you want to know who it is, the skull is an adequate portion of the body to make that determination, and if the state is contending that the cause of death of that person was from the—a shot to the skull and that was preserved, that may be enough.

. . . .

But if what they have is not sufficient to let your expert to determine, or to examine their report and determine from the evidence that's preserved the cause of death or to dispute that or the identity of the person, then I would consider granting your motion to exhume the body, if that becomes an issue. At least at this point, I'll hold off on that until additional discovery.

MR. CAMPBELL: Thank you, Judge.

Approximately one month later, on 4 November 2010, Judge Titus during open court orally ordered “whatever discovery the State currently has be turned over to Mr. Campbell.” Judge Titus entered a written order on 7 December 2010 requiring the Durham County District Attorney's Office to “preserve and protect all evidence collected by any and all agencies that may be relevant to the trial of



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these matters.” The order specifically encompassed “the human bones examined by the Office of the Medical Examiner for North Carolina to determine the cause and manner of death,” but made no specific mention of the bones used by the OCME to identify the victim. At the time of the order’s entry, Defendant had still not received a copy of the autopsy report from the State.

On 30 November 2010, the State filed a discovery response indicating it was disclosing to Defendant, among other things, “[a] copy of the State’s entire file regarding [the] case,” and that it was “not aware of any additional material or information which may be exculpatory in nature with respect to the Defendant.” The discovery response indicated that “[s]hould [the State] learn of the existence of any such [potentially exculpatory] material or information in the exercise of due diligence, we will notify the Defendant.” Defendant did not receive a copy of the autopsy report until 5 January 2011. The following day, 6 January 2011, District Attorney Cline forwarded a copy of Judge Titus’ 7 December 2010 order requiring the preservation of evidence to the OCME for the first time.

At a competency hearing on 6 May 2011, Senior Resident Superior Court Judge Orlando F. Hudson, Jr. found Defendant competent to proceed in light of the parties’ stipulation to the information contained in the report prepared by the staff at Dorothea Dix. At this same hearing, Mr. Campbell requested to be heard with respect to the issue of Defendant’s bond at the next available case management session. Mr. Campbell also inquired about the remains he believed were still in possession of the OCME:

[MR. CAMPBELL]: This case involves some evidence that was preserved, as I understand it, by the medical examiner’s office, those being some human bones. And it’s my understanding that there was a determination made about the identity of this person, as well as the manner and cause of death of that person. We’re going to want to hire someone, a forensic pathologist, to do an independent testing of those items so that we can see if he or she concurs with what the medical examiner has said. I’ve asked [Assistant District Attorney Roger] Echols to contact the medical examiner’s office to try to arrange whatever protocol they may have as to how we go about that[.] I’ve certainly never had to do this type of testing before, and I’m asking Mr. Echols to arrange that.

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THE COURT: Yes.

MR. ECHOLS: Yes, Your Honor. Mr. Campbell is correct . . . as far as what the evidence is in the case. And I have been in contact with the medical examiner's office. I expected to receive a call back as early as today, but I had not as of yet, as far as regarding the procedures for a defense expert to examine the evidence in order to be able to make their findings. What I did get from the medical examiner's office is this type of thing has been done before, and they will accommodate the Court's order. However, I do not know exactly the procedure yet, and I will hopefully have that today, but I certainly should have it well before general CMS.

Subsequently, at the scheduled 7 June 2011 bond reduction hearing before Judge Hudson, Mr. Campbell expressed concern about the state of the remains and its potential impact on Defendant's case. Mr. Campbell explained that:

[t]he bones were taken to the medical examiner's office and allegedly a positive identification was made at the medical examiner's office.

Sometime in September of last year [(2010)] the District Attorney informed me that the bones had been returned to the family for burial. At that time I indicated to the District Attorney that we had a motion to preserve the evidence. And that, in fact those bones—that being the evidence—had been destroyed that we would be moving for a motion to dismiss.

The District Attorney represented to the court at that time that the bones or the skeletal remains that had been used by the medical examiner to identify who this person was had in fact been preserved and maintained at the medical examiner's office.

. . . .

When I started reviewing the autopsy report it indicated in that report that the identification of the body had been made not through any examination of the bones but through a dental examination.

. . . .

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We are now under the belief that the evidence that would be needed by the defendant for an independent examination so that we can, through our own expert, identify who this person was [and] the cause and the manner of death had been destroyed. That those . . . teeth no longer exist. That they are not at the medical examiner's office.

We would argue that that is highly prejudicial to Mr. Dorman's case; that we have been deprived of the opportunity to have an independent examination. And that for those reasons, if that evidence is not present, that this case against Mr. Dorman should be dismissed.

Mr. Echols said he would confer with the OCME to determine exactly what remains were still in its possession. Judge Hudson retained jurisdiction over the matter, and scheduled a follow-up hearing for 9 June 2011. At that hearing, Mr. Echols reported that the OCME had in fact released most of the bones to Ms. White, withholding only a 7-10 centimeter long piece of the skull bearing the small, gray, round discolorations. Mr. Campbell argued that since the jaw bone and teeth used by the OCME to make an identification had been destroyed, Defendant was irreparably prejudiced in his ability to prepare an adequate defense, and requested that the charge against Defendant be dismissed. Judge Hudson suggested Mr. Campbell file a formal motion to that effect, and requested the parties agree on a date for a hearing on the motion.

***D. Hearing on Motion to Dismiss***

Defendant's "Motion to Dismiss Because of Destruction of Evidence" came before Judge Hudson on 28 June 2011. At the hearing, Defendant called Dr. Privette as his only witness. Dr. Privette testified that in making the identification of the bones as Ms. Boxley he relied on a comparison of a radiograph of the jaw bone containing the victim's teeth, the jaw bone itself, and ante-mortem radiographs he received from the Durham Police Department.<sup>1</sup> Dr. Privette acknowledged that the jaw bone used to make the identification had subsequently been released to Ms. White and been cremated. When asked why the OCME retained the bones for nearly two months after the

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1. The autopsy report prepared by Dr. Privette states that the body was identified "based on comparisons between ante-mortem radiographs of the head and examination of the remains."

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autopsy was performed, Dr. Privette indicated that the OCME released them when the “family requested the remains.”

Although Dr. Privette asserted that the jaw bone was “not necessary to make a positive identification,” he acknowledged that in the week prior to his testimony, the OCME and he had solicited a second opinion regarding identification from Dr. Allen Samuelson of the UNC School of Dentistry. In an email to Dr. Privette, Dr. Samuelson stated that he was “indeed . . . having a difficult time of [identifying the victim,]” by comparing the ante- and post-mortem radiographs of the jaw bone the OCME had provided. Specifically, he asked Dr. Privette if he could send (1) a photograph of the jaw bone taken from a particular vantage point and (2) additional radiographs of the jaw bone. Despite the unavailability of this evidence in light of the jaw bone’s cremation, Dr. Samuelson ultimately concluded upon review of the x-rays and photographs that were provided to him that the “many areas of congruity and no manifest exclusionary information . . . supports the evidence” that the bones were in fact Ms. Boxley’s. Dr. Privette claimed he had not sought a second opinion earlier because he “didn’t think [he] was going to need it until [the defense] started questioning the identification.”

Dr. Privette admitted that he believed he was dealing with a homicide from the beginning of his involvement, “due to the circumstances of the case” as conveyed to him by the Durham Police Department. He testified that he had no personal contact with the District Attorney’s Office about Defendant’s case prior to 21 September 2010, and was not aware of anyone else from the OCME having had contact with the District Attorney’s Office during that time.

Dr. Privette also indicated that he did not consider the bones in this case to be “evidence,” and that, in the three-plus years he had worked as a medical examiner, he had never “submitted a body as evidence.” He further explained that the OCME does not have written procedures dealing with the release of human remains, because it does “essentially the same thing every time.” Dr. Privette testified that “[o]nce we [(OCME)] are done with our investigation of the body and there has been a positive identification, and once a family comes forward to claim the remains, we release the body.” Dr. Privette acknowledged that the OCME retained a small portion of the skull containing the small discolorations, consistent with the State’s theory of the cause of death, in the event someone wanted to review that

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portion of the bones at a later date. He explained that the OCME did not keep the other bones because “we [(OCME)] didn’t feel like there was any part of the other bones that had any evidentiary value or any value as [to] determining the manner and cause of death.”

Although a portion of the skull was retained by the OCME, this fact was not noted in the autopsy report. In Dr. Privette’s opinion, this made the autopsy report “incomplete” as opposed to “inaccurate.” He conceded that his conclusion that “the cause of death in this case is undetermined homicidal violence, with findings suggestive of blunt head trauma consistent with a shotgun wound” was largely based on the information provided to him by the Durham Police Department. Dr. Privette acknowledged that the OCME was not able to “determine the cause of death,” but was able to “[come] to a decision on [the] manner of death” being homicide. Dr. Privette testified that although bones are “not the best material to use for a DNA sample,” obtaining a DNA sample from bones was “possible” albeit “[n]ot in all circumstances.” No DNA sample had been obtained from the jaw bone at the time of his testimony.

Dr. Privette also acknowledged receiving a subpoena which, among other things, required he produce “[t]he complete medical examiner’s file” regarding Ms. Boxley’s death including, “[a]ny and all email transmissions to or from the chief medical examiner’s office relative to [Ms. Boxley] and/or [Defendant].” At the hearing, Dr. Privette only produced two emails—an inquiry from a staff member in the OCME’s record office asking for the availability of a death certificate, and Dr. Privette’s response. Dr. Privette did not produce any emails regarding the release of the bones to Ms. White.

The State did not present any testimonial evidence at the 28 June 2011 hearing, but did introduce a number of photographs, a copy of Dr. Samuelson’s comparison report, and Dr. Privette’s autopsy report. At the conclusion of the hearing, Judge Hudson took Defendant’s Motion to Dismiss under advisement.

***E. Discovery by Judge Hudson of VCS Involvement***

After the hearing on Defendant’s Motion to Dismiss, Judge Hudson determined upon review of the record that North Carolina Victim Compensation Services (“VCS”) had paid for the cremation of the bones released by the OCME. On 7 July 2011, Judge Hudson issued an order requiring VCS to turn over its entire file with regard to Ms. White’s VCS application. In an order dated 13 July 2011 Judge

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Hudson placed a redacted version of those files into the record. This order contained a finding that the VCS file “[had] been in the possession of the State of North Carolina since August, 2010 but [had] not previously [been] provided to the Defendant or the Court for review.” Judge Hudson further found that “Defendant had a statutory and constitutional right to receive the information” in the VCS file “in a timely manner.”

Following entry of this order, the State filed a motion on 14 July 2011 seeking to reopen the presentation of evidence on the Motion to Dismiss. In this motion, the State claimed that “it had no opportunity to examine the files of [VCS]” at any point, and asserted that VCS was not a “prosecutorial agency” such that the State had any obligation to turn over its files during discovery. Judge Hudson granted the State’s motion to reopen the presentation of evidence in part, and scheduled hearings for the week of 15 August 2011 “to address the issues of whether or not the State and its agents assisted in the destruction of the bones and teeth[.]”

***F. Hearing on the State’s Role in Destruction of the Bones***

At a hearing held over the course of two days, the trial court heard testimony from a number of witnesses regarding their involvement in Defendant’s case.

***1. Detective Robinson’s Testimony***

After first calling Investigator White and another investigator from the Orange County Sheriff’s Department, the State called Detective Christopher Robinson of the Durham Police Department. Detective Robinson testified that he was assigned to investigate Defendant’s case in July 2010, after receiving information from Orange County law enforcement regarding the discovery of a person in possession of human bones. Believing these bones might be those of Ms. Boxley, Detective Robinson asked the OCME what information would be helpful in making an identification.<sup>2</sup> He testified that he then obtained a court order allowing him to retrieve from Duke Hospital a CD containing a CT scan of Ms. Boxley’s head and teeth, and delivered that CD to the OCME. Detective Robinson also provided the OCME with a synopsis of his investigation up to that point,

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2. Detective Robinson did not testify as to why he suspected Ms. Boxley was the victim in this case. However, the record reveals that a legal assistant in the Durham Police Department remembered the circumstances of Ms. Boxley’s disappearance two years earlier, and that this may have been the basis for the Durham Police Department’s initial belief regarding the victim’s identity.

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including his suspicion that the victim was Ms. Boxley, “so that [the OCME could] have an understanding of what [the Durham Police Department thought] the cause of death might have been.”

Detective Robinson then testified that sometime in mid-July 2010, Dr. Clyde Gibbs, an employee of the OCME, informed him that Dr. Privette had identified the bones as Ms. Boxley’s. Detective Robinson then contacted Ms. White, Ms. Boxley’s next of kin, and informed her of her sister’s death. He also notified the OCME that he had contacted Ms. White, and “gave [the OCME her] information.” Detective Robinson testified that he denied encouraging Ms. White to cremate the bones or knowing that Ms. White intended to cremate the bones. He claimed that he was not aware of the order to preserve evidence entered by Judge Titus until “way after” the bones had been released by the OCME.

Detective Robinson indicated that he contacted Lukas Strout, a victim’s advocate in the Durham Police Department’s Victim Services Unit, and asked him if he would call Ms. White, as she had inquired about possible services that might have been available. Detective Robinson stated that this was the only contact he had with Mr. Strout during the investigation.

*2. Mr. Strout’s Testimony and the OCME’s Release of the Remains*

The State next called Mr. Strout. He testified that he had been employed in the Durham Police Department’s Victims Services Unit as a victim’s advocate for about seven years, and that as part of his job, he acts as a “[l]iaison between families, investigators, the court personnel, [and] victim compensation [services].” He testified that he has no investigational responsibilities or law enforcement authority.

Mr. Strout stated that Ms. White contacted him shortly after Detective Robinson had mentioned her. On 26 August 2010 Mr. Strout sent Ms. White materials regarding services available to the families of crime victims in North Carolina. These materials included information about how to apply for financial compensation from VCS. He explained that a VCS application is “an application that is offered by [VCS] as a means of financially compensating victims of violent crimes, and [that] they pay [certain expenses] as a last resort.” Mr. Strout testified that he assisted Ms. White in preparing her application for compensation, which was eventually approved on 5 January 2011.

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Mr. Strout also explained that Ms. White had twice contacted him concerning when the remains of her sister would be released from the OCME. On 8 August 2010, Mr. Strout e-mailed Dr. Gibbs in the OCME requesting “information about what needed to be done for the family to receive [the] remains.” Dr. Gibbs responded to Mr. Strout’s 8 August 2010 email regarding release of Ms. Boxley’s bones on 10 September 2010, by saying he had contacted Detective Robinson, “wondering if there was any reason to hold on to the remains any longer.” Mr. Strout responded that same day, thanking Dr. Gibbs for his help, and indicating he would notify the family once the OCME heard from Detective Robinson.

On 19 September 2010, Dr. Gibbs emailed Mr. Strout the following:

Per Det. Robinson, we are free to let Ms. Boxley be released. The family just needs to make arrangements w/funeral home/crematory in SC and have that service either call us or have them select a transporter to p/her up . . . . Thank you again so very much.<sup>3</sup>

Two days later, the OCME released the bones to a mortuary in Durham, which cremated them. The bones that were released were cremated on either 22 or 23 September 2010, and Ms. White received her sister’s ashes on 24 September 2010.

Mr. Strout testified that he never recommended cremation to Ms. White, and that “to the best of his knowledge” no one in the Durham Police Department or District Attorney’s Office had ever advised him to recommend cremation. He denied having ever consulted with police investigators or the District Attorney’s Office about what should be done with the remains. He did implicitly acknowledge that he was aware Ms. White was considering cremation as an option. However, he did not disclose the nature of his conversations with Ms. White to the District Attorney’s Office because they were “confidential client interaction[s].”

### *3. Testimony of VCS Staff*

The State next called three employees of VCS: administrative assistant Melanie Palzatto, claims investigator Liddie Shopshire, and VCS director Janice Carmichael. All three testified about the process

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3. None of these emails between Robinson, Gibbs, and Strout were produced by Dr. Privette at the 28 June 2011 hearing on Defendant’s Motion to Dismiss.



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VCS utilized in evaluating Ms. White's application for compensation. Ms. Palzatto testified that VCS received what it considered to be Ms. White's original application on 27 September 2010.<sup>4</sup> Ms. Palzatto forwarded the application to Ms. Shopshire who investigated the claim. As part of her investigation, Ms. Shopshire contacted Detective Robinson on or about 22 October 2010 requesting information about the case. Detective Robinson gave her a brief description of the Durham Police Department's theory of the case. This information, along with Ms. White's completed application, "was enough for [Ms. Shopshire] to make a recommendation" to Ms. Carmichael that she approve the application.

Upon the recommendation of Ms. Shopshire, Ms. Carmichael gave final approval to Ms. White's application on 5 January 2011. Ms. Carmichael testified that although VCS conducts an independent investigation into whether to approve an application using information provided by police, VCS's files are considered confidential, and are not shared with the prosecutor's office absent a court order. Ms. Carmichael testified that VCS does not consult with the prosecution in determining whether to approve an application. She stated her office did not have any contact with the Durham District Attorney's Office, the Durham Police Department, or Ms. White concerning whether the bones in this case should be cremated. Ms. Carmichael explained that in the eleven years she had been the director of VCS, she had never conferred with any prosecutor's office or law enforcement agency before making a recommendation to give an award, and that in her opinion VCS is not a "prosecutorial agency."

*4. Ms. Archibald's Testimony*

The following day, the court heard testimony from Martha Ann Archibald, director of the J. Henry Stuhr funeral home in Charleston, South Carolina. Ms. Archibald testified that in August 2010, Ms. White met with her regarding funeral arrangements for her sister. Ms. White explained to Ms. Archibald that there had been a death in her family and that she did not have the financial means to afford funeral arrangements. However, Ms. White indicated that she was applying for assistance from VCS. Being familiar with a similar program in South Carolina, Ms. Archibald agreed to provide funeral services for Ms. White and her family. Ms. Archibald testified that Ms. White

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4. Ms. White had previously filed an application, but it had been rejected for technical non-compliance with the application's instructions. In response to this first application, VCS requested Ms. White submit another application.

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requested her sister's remains be cremated, and that the remains be delivered to her in South Carolina. Ms. Archibald ultimately arranged to have a mortuary in Durham pick up the remains from the OCME, cremate them, and transport them to South Carolina.

*5. Ms. White's Testimony*

Following Ms. Archibald's testimony, the State called Ms. White. She testified that Detective Robinson had first notified her of her sister's death in July 2010. She estimated that she had more than thirty conversations with Mr. Strout between July 2010 and September 2010. In addition to her communications with Mr. Strout, Ms. White also had numerous conversations with Zandra Ford, District Attorney Cline's administrative assistant, and Detective Robinson's supervisor, Sergeant Perkins. She estimated having had nearly 50 conversations with Sergeant Perkins alone in July and August 2010. However, Ms. White testified that none of her conversations with Ms. Ford or Sergeant Perkins concerned a time table for the release of her sister's remains; instead, she only spoke with Mr. Strout in "the second week of July" about the possibility of getting her sister's remains released. Mr. Strout's response to Ms. White's questions in this regard was that he would "look into it and see if the coroner [was] ready to release [the] body." Ms. White testified that she was under the impression the OCME was ultimately the entity responsible for deciding when her sister's remains would be released, although she never called or communicated with the OCME directly. As of the date of her testimony, Ms. White remained unsure of who ultimately made the decision to release the bones.

Ms. White stated that it was her desire to have her sister cremated and that no one from the Durham Police Department or District Attorney's Office suggested she cremate her sister's bones. Ms. White testified that no one from the OCME or the District Attorney's Office informed her that she had not received all of the bones recovered from Defendant, and that she only discovered this fact after reading media accounts of the case.

*6. Dr. Radisch's Testimony*

The hearing concluded with testimony from Dr. Deborah Radisch, the Chief Medical Examiner for the State of North Carolina, and head of the OCME. Dr. Radisch testified that she assigned this case to Dr. Privette in July 2010, and supervised his work in the matter. She explained that her office "follow[s] a procedure according to the

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statutes that basically states that when we are done with our inspection and investigation of the remains, then we release the remains to the next of kin.” Dr. Radisch claimed that her office followed this procedure in this case, and that the OCME was not notified that it needed to retain the bones until over four months after they had been released and cremated. She declared that she did not consider the portion of the skull that was retained by her office to be “evidence,” and explained the rationale for retaining only this particular bone fragment:

[W]e retained a small piece of skull which had some markings on it that were suspicious to us, but [we are] certainly not a hundred percent sure that these could represent wipe-off from pellets on the inside of the skull. And . . . there might be [DNA], and we wouldn’t know [whether DNA was available] until we tried or until someone tried [to obtain a sample].

Dr. Radisch admitted she was aware of the subpoena served upon Dr. Privette in June 2010 requiring him to produce all email communications from the OCME involving this case. However, she stated that she did not know why Dr. Privette failed to produce the emails between Dr. Gibbs, Detective Robinson, and Mr. Strout at that time. She speculated that Dr. Privette had probably omitted the emails because he had only “searched his account and gave [the Court] whatever e-mails he had in his account.”

Dr. Radisch could not confirm whether her office did anything with the bones between 5 August 2010 and 21 September 2010, and could not provide an explanation for the lack of any information in the OCME’s file during this time. She opined that under her interpretation of the statute requiring release of remains to the next of kin upon completion of an “investigation,” the word “investigation” meant “the investigation in our [(OCME’s)] office,” although she observed “that sometimes [that investigation] can go along with the investigation of law enforcement.” She denied that Detective Robinson was the individual who made the ultimate decision to release the bones, despite the emails exchanged between Dr. Gibbs and Detective Robinson.

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At the conclusion of the hearing conducted on 15 and 16 August 2011, Judge Hudson granted Defendant’s Motion to Dismiss, finding that “the State and/or its agents have destroyed evidence and that as a result of this destruction his requested relief under North Carolina

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General Statutes 15A-903, 910, 954, and the due process clauses of the [5th] and 14th Amendment, and the case of Brady versus Maryland, is allowed.” The State served written notice of appeal on 24 August 2011.

On 16 August 2011, Judge Hudson ordered Defendant to undergo an immediate medical and mental health evaluation to determine if he “is a danger to himself or others.”<sup>5</sup> On 14 November 2011, Judge Hudson entered a second written order regarding Defendant’s Motion to Dismiss. The State served a written notice of appeal from this order on 22 November 2011. The record in this case was settled on 18 January 2012 by stipulation of the parties.

**II. Jurisdiction**

[1] The North Carolina General Statutes provide that “[u]nless the rule against double jeopardy prohibits further prosecution, *the State may appeal from the superior court to the appellate division* . . . [w]hen there has been a decision or judgment dismissing criminal charges as to one or more counts.” N.C. Gen. Stat § 15A-1445(a)(1) (2011). Under both the federal and North Carolina constitutions, jeopardy does not attach until, among other things, a “jury is impaneled and sworn.” *See State v. Gilbert*, 139 N.C. App. 657, 665-66, 535 S.E.2d 94, 99 (2000). Defendant’s case has not yet proceeded to trial. Therefore, jeopardy has not yet attached here. Thus, we have jurisdiction over the State’s appeal.

**III. Analysis****A. Standard of Review**

In reviewing a trial court’s grant of a criminal defendant’s motion to dismiss, we are “ ‘strictly limited to determining whether the trial judge’s underlying findings of fact are supported by competent evidence, in which event they are conclusively binding on appeal, and whether those factual findings in turn support the judge’s ultimate conclusions of law.’ ” *State v. Williams*, 362 N.C. 628, 632, 669 S.E.2d 290, 294 (2008) (quoting *State v. Cooke*, 306 N.C. 132, 134, 291 S.E.2d 618, 619 (1982)). In contrast, this Court reviews a trial court’s conclusions of law *de novo*. *See State v. Biber*, 365 N.C. 162, 168, 712 S.E.2d 874, 878 (2011).

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5. It is unclear from the record whether Defendant remains under medical and/or psychological supervision.

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Distinguishing a finding of fact from a conclusion of law can be an elusive task. “As a general rule, ‘any determination requiring the exercise of judgment . . . or the application of legal principles . . . is more properly classified a conclusion of law.’” *In re B.W.*, 190 N.C. App. 328, 335, 665 S.E.2d 462, 467 (2008) (quoting *In re Helms*, 127 N.C. App. 505, 510, 491 S.E.2d 672, 675 (1997)) (alterations in original). Ultimately, “[a] trial court’s mislabeling a determination, however, is inconsequential as the appellate court may simply re-classify the determination and apply the appropriate standard of review.” *State v. Hopper*, 205 N.C. App. 175, 179, 695 S.E.2d 801, 805 (2010) (citation and quotation marks omitted).

**B. Constitutional Violations**

In its order, the trial court concluded that the State flagrantly violated Defendant’s constitutional rights by: (1) failing to “provide [Defendant] in a timely manner with access” to the bones used by the OCME to determine the identity of the victim; (2) “failing to discover and disclose to [Defendant] the role [the State’s] agents took in assisting, facilitating, and paying for the permanent destruction of material and favorable evidence in a timely manner;” (3) failing to provide Defendant with access to certain emails exchanged between the OCME and Detective Robinson prior to the 28 June 2011 hearing on Defendant’s Motion to Dismiss; (4) failing to “correct misrepresentations of material fact” made by District Attorney Cline, Dr. Privette, and Detective Robinson at various points during the proceedings against Defendant; and (5) failing to disclose information in the State’s possession, while Defendant was incarcerated, that the trial court concluded the State “had a statutory and constitutional obligation to disclose.” The trial court further concluded that these violations “caused such irreparable prejudice to [Defendant’s] case that a dismissal with prejudice is the only appropriate remedy under N.C. Gen. Stat. §15A-954(a)(4).”

N.C. Gen. Stat. § 15A-954(a)(4) (2011) provides that “[t]he court on motion of the defendant must dismiss the charges stated in a criminal pleading if it determines that: . . . [t]he defendant’s constitutional rights have been flagrantly violated and there is such irreparable prejudice to the defendant’s preparation of his case that there is no remedy but to dismiss the prosecution.” “As the movant, [the] defendant bears the burden of showing the flagrant constitutional violation and . . . irreparable prejudice to the preparation of his case.” *Williams*, 362 N.C. at 634, 669 S.E.2d at 295. The decision that a defendant has

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satisfied the elements of N.C. Gen. Stat. § 15A-954(a)(4), and thus is entitled to a dismissal, is a conclusion of law reviewable *de novo*. *Id.* at 632, 669 S.E.2d at 294. “[S]ince [Section 15A-954(a)(4)] contemplates drastic relief, a motion to dismiss under its terms should be granted sparingly.” *State v. Joyner*, 295 N.C. 55, 59, 243 S.E.2d 367, 370 (1978).

As the trial court held that each of the alleged constitutional violations both individually and cumulatively necessitated dismissal with prejudice of the charge against Defendant, we must address each of the State’s challenges to the alleged violations.

*1. Destruction of Human Remains*

[2] The State first argues that the trial court erred in finding that the destruction of the purported bones of Ms. Boxley resulted in a flagrant violation of Defendant’s constitutional right to due process under *Brady v. Maryland*, 373 U.S. 83 (1963), and its progeny.

In *Brady*, the United States Supreme Court held that “suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution.” *Id.* at 87. This includes evidence “known only to police investigators and not to the prosecutor.” *Kyles v. Whitley*, 514 U.S. 419, 438 (1995). “[T]he duty to disclose such evidence is applicable even though there has been no request by the accused.” *Strickler v. Greene*, 527 U.S. 263, 280 (1999).

“To establish a *Brady* violation, a defendant must show (1) that the prosecution suppressed evidence; (2) that the evidence was favorable to the defense; and (3) that the evidence was material to an issue at trial.” *State v. McNeil*, 155 N.C. App. 540, 542, 574 S.E.2d 145, 147 (2002), *disc. rev. denied*, 356 N.C. 688, 578 S.E.2d 323 (2003). “Favorable” evidence can be either exculpatory or useful in impeaching the State’s evidence. *Williams*, 362 N.C. at 636, 669 S.E.2d at 296. “Evidence is considered ‘material’ if there is a ‘reasonable probability’ of a different result had the evidence been disclosed.” *State v. Berry*, 356 N.C. 490, 517, 573 S.E.2d 132, 149 (2002) (citing *Kyles*, 514 U.S. at 434). “A ‘reasonable probability’ is a probability sufficient to undermine confidence in the outcome.” *United States v. Bagley*, 473 U.S. 667, 682 (1985). However, when the evidence is only “potentially useful” or when “‘no more can be said [of the evidence] than that it could have been subjected to tests, the results of which might have exonerated the defendant,’” the State’s failure to preserve the

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evidence does not violate the defendant's constitutional rights unless a defendant can show bad faith on the part of the State. *State v. Mlo*, 335 N.C. 353, 373, 440 S.E.2d 98, 108 (1994), *cert. denied*, 512 U.S. 1224 (1994) (quoting *Arizona v. Youngblood*, 488 U.S. 51, 57 (1988)).

The State acknowledges that most of the bones that are the subject of this dispute have been destroyed. Accordingly, it is speculative to evaluate to what degree, if at all, those bones would have been material and favorable to Defendant's case. Thus Defendant cannot meet his burden of demonstrating the evidence was actually, as opposed to potentially, material and favorable to his defense. Accordingly, Defendant may only carry his burden of demonstrating a *Brady* violation in the presence of bad faith on the part of the State. *See id.*

**[3]** In its order, the trial court did in fact make findings that the State acted intentionally and in bad faith with regard to the destruction of the bones. Specifically, the trial court found, *inter alia*, that:

126. [T]he Office of the District Attorney for Durham County, the Durham Police Department, and the Office of the Chief Medical Examiner for the State of North Carolina were aware of the importance of establishing the identity of the decedent . . . in this case from July 14, 2010 through the present. When collectively they allowed, facilitated, and arranged for the permanent destruction of the remains in this case they knew they were destroying information that would deprive [Defendant] of the ability to obtain and investigate information that would be material and favorable to his defense, . . . increasing the likelihood he would waive his rights to trial and enter a plea of guilty . . . .

127. [T]he Office of the Durham County District Attorney and its agents to include the Office of the Chief Medical Examiner and the Durham Police Department intentionally failed to document appropriately, preserve information and disclose information that they knew had to be disclosed to [Defendant] as required by statutes, case law, court orders and the Constitution of the United States of America.

129. [T]he motivation for the failure to disclose to the defense that the remains had been destroyed until June 9, 2011 and the role the state's agents assumed in facili-

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tating and paying for the permanent destruction of the remains was an intentional suppression of *Brady* information by the Durham District Attorney's Office and was intended to deprive the defendant of knowledge that would have enabled his attorney to prepare a successful cross examination of multiple witness[es] they knew to be critical to the state's case. . . .

In sum, the trial court found bad faith not only on the part of the District Attorney's Office, but also on the part of the Durham Police Department, VCS, and the OCME.

However, we need not address the issue of bad faith or the relationship, if any, between the District Attorney and the other agencies. Evidence of bad faith standing alone, even if supported by competent evidence, is not sufficient to support a dismissal under N.C. Gen. Stat. § 15A-954(a)(4).

A dismissal pursuant to Section 15A-954(a)(4) is not appropriate in every case in which there has been a flagrant constitutional violation. The violation must have also caused "such irreparable prejudice to the defendant's preparation of his case that there is no remedy but to dismiss the prosecution." *Williams*, 362 N.C. at 639, 669 S.E.2d at 298 (quotation marks and citation omitted). "[D]efendant bears the burden of showing . . . irreparable prejudice to the preparation of his case." *Id.* at 634, 669 S.E.2d at 295. Assuming, but in no way deciding, that Defendant's constitutional rights were flagrantly violated, we must consider the trial court's conclusion that any violation "caused such irreparable prejudice to [Defendant's] case that a dismissal with prejudice is the only appropriate remedy under N.C. Gen. Stat. § 15A-954(a)(4)." This analysis is conceptually separate from the issue of whether a defendant has met his burden under *Brady* of showing that evidence was "material" or "favorable" such that a finding of bad faith is unnecessary.

As noted, "[Section 15A-954(a)(4)] contemplates drastic relief, [and] a motion to dismiss under its terms should be granted sparingly." *Joyner*, 295 N.C. at 59, 243 S.E.2d at 370. "The decision that a defendant has met the statutory requirements of [Section] 15A-954(a)(4) and is entitled to a dismissal of the charge against him is a conclusion of law subject to *de novo* review." *State v. Allen*, \_\_\_ N.C. App. \_\_\_, \_\_\_, 731 S.E.2d 510, 520 (2012) (quotation marks and citation omitted). "Under a *de novo* review, the court considers the matter anew and freely substitutes its own judgment for that of the



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lower tribunal.” *Williams*, 362 N.C. at 632–33, 669 S.E.2d at 294 (quotation marks and citation omitted).

Upon review of the record, we hold the trial court was premature in concluding that the alleged violations “caused such irreparable harm to [Defendant’s] case as to require a dismissal with prejudice[,]” because Defendant cannot meet his burden of demonstrating his defense has been irreparably harmed. As explained above, the unavailability of the bones for independent testing makes it impossible to determine to what extent those bones would have been helpful to Defendant’s case. Under the circumstances of this case as it has progressed thus far, Defendant cannot meet his burden of demonstrating his defense has been actually, as opposed to potentially, prejudiced.

Furthermore, the thrust of the defense Motion to Dismiss and the trial court’s ruling is premature. There has been no trial. The defense has yet to engage any expert, and has failed to attempt to conduct any tests, whether for DNA or to attempt to replicate the photographic identification of the decedent using the radiographs of her teeth. It may well be that upon the hiring of an expert and analyzing the partial skull remains which still are being held by the OCME, Defendant’s expert may concur in the opinion of both Dr. Privette and Dr. Samuelson that the jaw bone is indeed that of Ms. Boxley. Until it can be established that the partial remains are untestable or that the identification of the deceased is somehow flawed or incapable of repetition, we fail to see how the defense has been irreparably prejudiced.

In addition, we also disagree with the trial court that dismissal of the charge against Defendant would be the *only* appropriate remedy for the State’s malfeasance. At Defendant’s trial, the presiding judge will be endowed with wide latitude in determining how to most fairly address any flagrant violation of Defendant’s rights. Indeed, Judge Hudson contemplated such lesser remedies elsewhere in his order in response to the alleged discovery violations. Paradoxically, it is Judge Hudson’s diligence and persistence that has largely prevented irreparable prejudice to Defendant up to this point.

In sum, the trial court erred by prematurely concluding that Defendant’s ability to prepare a defense was so irreparably prejudiced that a dismissal of the charge pursuant to Section 15A-954(a)(4) was the only appropriate remedy.

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*2. Failure to Disclose Role of the State in Destruction*

[4] We also disagree with the trial court's conclusion that the State's failure to produce certain evidence before the 15 August 2011 hearings warrants dismissal of the charge against Defendant. Specifically, the trial court determined that both (1) the State's failure to disclose "the role its agents took in assisting, facilitating, and paying for the permanent destruction" of the remains, and (2) Dr. Privette's failure to produce the email records subject to subpoena, each flagrantly violated Defendant's constitutional rights.

However, our Supreme Court has "previously held that due process and *Brady* are satisfied by the disclosure of . . . evidence at trial, so long as disclosure is made in time for the defendant[] to make effective use of the evidence." *State v. Taylor*, 344 N.C. 31, 50, 473 S.E.2d 596, 607 (1996) (citing *State v. Jackson*, 309 N.C. 26, 33, 305 S.E.2d 703, 710 (1983)). In *Taylor*, our Supreme Court found no *Brady* violation occurred when the State provided a defendant with new evidence four days before the close of the State's case. *Id.*

Defendant is now in possession of the information the State allegedly failed to disclose. Accordingly, he has "ample opportunity to make effective use of it." *Allen*, \_\_\_ N.C. App. at \_\_\_, 731 S.E.2d at 522 (quotation marks and citation omitted). Accordingly, we determine the trial court erred by concluding Defendant's rights were flagrantly violated under *Brady* in this regard.

*3. Failure to Correct Misrepresentations*

[5] The trial court also concluded that three instances in which the State "fail[ed] to correct misrepresentations of material fact . . . flagrantly violated [Defendant's] constitutional rights[.]" In support of this conclusion, the trial court cites *Napue v. Illinois*, 360 U.S. 264 (1959), for the proposition that "intentional misrepresentation[s] by the District Attorney and/or failure to correct testimony that the District Attorney knows to be false is a violation of the Due Process Clause of the Fourteenth Amendment." Irrespective of the soundness of the trial court's factual findings supporting this conclusion, we hold *Napue* is inapplicable under the facts of this case.

In *Napue*, the United States Supreme Court held that "a conviction obtained through the use of false evidence, known to be such by representatives of the State, must fall under the Fourteenth Amendment." 360 U.S. at 269. Moreover, our Supreme Court has held that "when a defendant shows that testimony was in fact false,

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material, and knowingly and intentionally used by the State to obtain his conviction, he is entitled to a new trial.” *State v. Sanders*, 327 N.C. 319, 336, 395 S.E.2d 412, 423 (1990).

Thus, the holding of *Napue* is not applicable to the facts of this case. Here, there has been no trial, nor has any conviction been obtained. Furthermore, the relief provided by *Napue* is the grant of a new trial to the aggrieved defendant. We therefore hold the trial court erred in its reliance on *Napue*.

*4. Alleged Eighth Amendment Violation*

[6] We again observe that we are limited on appeal “to determining whether the trial judge’s underlying findings of fact are supported by competent evidence . . . and whether those factual findings in turn support the judge’s ultimate conclusions of law.” *Williams*, 362 N.C. at 632, 669 S.E.2d at 294 (quotation marks and citation omitted). “A trial court must make sufficient findings of fact and conclusions of law to allow the reviewing court to determine whether a judgment, and the legal conclusions that underlie it, represent a correct application of the law.” *McKyer v. McKyer*, 179 N.C. App. 132, 148, 632 S.E.2d 828, 837 (2006) (quotation marks and citation omitted).

In its order, the trial court concluded:

8. [Defendant’s] pretrial incarceration from July 14, 2010 until August 16, 2011 under a bond of \$750,000.00 which he was unable to make due to his indigent status while simultaneously suppressing the disclosure of material and favorable information to [Defendant] and the Court, failing to preserve and disclose *Brady* information in the possession of the State and its agents, failing to disclose and document information that it had a statutory and constitutional obligation to disclose in a time frame established by direct court order flagrantly violated [Defendant’s] constitutional rights pursuant to the Eighth Amendment to the United States Constitution.

The State does not address in its brief this portion of the trial court’s order. However, we recognize the trial court’s conclusion that an Eighth Amendment violation occurred is in some sense inexorably intertwined with its broader conclusions regarding constitutional violations under *Brady* and subsequent cases.

While the trial court provided numerous citations to cases discussing the due process implications of the State’s actions in this

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case, it did not provide similar guidance as to how the State's actions violated Defendant's rights under the Eighth Amendment. Upon review of the trial court's order, we cannot determine the precise factual or legal basis for the trial court's specific conclusion that an Eighth Amendment violation occurred in this case. Accordingly, this conclusion of law cannot support a dismissal of the charge against Defendant.

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For the foregoing reasons, we hold the trial court erred in determining that the alleged constitutional violations "caused such irreparable prejudice to [Defendant's] case [such] that a dismissal with prejudice is the only appropriate remedy."

***C. Discovery Violations [Conclusions 10-12]***

We turn next to the portion of the trial court's order addressing the State's alleged discovery violations. The trial court concluded the State violated Defendant's statutory right to discovery, N.C. Gen. Stat. § 15A-903, in three ways: (1) by failing to document and disclose communications between the Durham Police Department, the District Attorney's Office, the OCME, VCS, and Ms. White; and specifically (2) by willfully failing "to fully and completely disclose the substance of conversations between Dr. Clyde Gibbs and Detective Christopher Robinson"; and (3) by willfully failing "to fully and completely disclose the substance of conversations and emails as required by lawfully issued subpoena served upon Dr. Jonathan Privette," which were discoverable as a matter of law. The trial court concluded that these discovery violations warranted two sanctions: (1) dismissal of the charge against Defendant pursuant to N.C. Gen. Stat. § 15A-910(a)(3b); and (2) the suppression at any future proceedings of statements or testimony given by Detective Robinson and Dr. Privette, including "any testimony by any witness that includes any opinions in which [Dr. Privette] facilitated or enabled based upon his work in this case."

***1. Dismissal as Sanction for Discovery Violations***

[7] N.C. Gen. Stat. § 15A-903(a)(1) (2011) provides that "[u]pon motion of the defendant, the court must order . . . [t]he State to make available to the defendant the complete files of all law enforcement agencies, investigatory agencies, and prosecutors' offices involved in the investigation of the crimes committed or the prosecution of the defendant." If a trial court determines that the State has violated statutory discovery provisions or a discovery order, it may impose a

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wide array of sanctions including dismissal of the charge with or without prejudice. *See* N.C. Gen. Stat. § 15A-910(a)(3b). However, “[i]f the court imposes any sanction, it must make specific findings justifying the imposed sanction.” N.C. Gen. Stat. § 15A-910(d). “Given that dismissal of charges is an ‘extreme sanction’ which should not be routinely imposed, orders dismissing charges for noncompliance with discovery orders preferably should also contain findings which detail the perceived prejudice to the defendant which justifies the extreme sanction imposed.” *Allen*, \_\_\_ N.C. App. at \_\_\_, 731 S.E.2d at 527-28 (internal quotation marks and citations omitted).

On appeal, we review the trial court’s decision to impose discovery sanctions for an abuse of discretion. *See State v. Locklear*, 41 N.C. App. 292, 295, 254 S.E.2d 653, 656 (1979). An abuse of discretion may occur when the trial court’s rulings are made “under a misapprehension of the law.” *State v. Cornell*, 281 N.C. 20, 30, 187 S.E.2d 768, 774 (1972).

Upon review of the trial court’s order, we cannot ascertain the basis for its determination that dismissal with prejudice was an appropriate sanction for the discovery violations it found. The trial court did find the State’s failure to disclose certain communications amounted to a deprivation “of material and favorable information [Defendant] needed in order to make critical decisions about his case.” The trial court also found that this non-disclosure was “intended to deprive the defendant of knowledge that would have enabled his attorney to prepare a successful cross examination of multiple witness[es]” and was “designed to influence [Defendant] and his counsel’s assessment of the strengths and weakness[es] of the state’s case as he decided whether to enter a plea of guilty or proceed to trial.” However, Defendant has not yet pled guilty or had an opportunity to proceed to trial. Furthermore, Defendant is currently in possession of the evidence the State initially failed to disclose. Thus, any harm to Defendant is either speculative or moot. Nowhere in the order does the trial court “detail the perceived prejudice to the defendant” resulting from the violations which would “justif[y] the extreme sanction imposed.” *Allen*, \_\_\_ N.C. App. at \_\_\_, 731 S.E.2d at 528 (quotation marks and citation omitted). Absent a finding explaining the specific and continuing prejudice Defendant will suffer, the trial court’s order dismissing the charge on this basis is in error. Accordingly, we reverse the trial court’s decision to grant Defendant’s Motion to Dismiss on the grounds that the State violated statutory discovery provisions.

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*2. Suppression as Sanction for Discovery Violations*

[8] At this juncture we must note that N.C. Gen. Stat. § 15A-1445(a)(1) allows the State to appeal from a “decision or judgment dismissing criminal charges as to one or more counts.” The General Statutes do not provide a similar right of appeal with regard to the imposition of lesser discovery sanctions upon the State.<sup>6</sup> However, the State has filed a Petition for Writ of Certiorari in the Alternative requesting we review the trial court’s lesser sanctions, which we grant in the interest of judicial economy.

As noted, the trial court’s order cites three ways in which the State violated Defendant’s statutory right of discovery: (1) failing to document and disclose communications between the Durham Police Department, District Attorney’s Office, the OCME, VCS, and Ms. White; and specifically (2) willfully failing “to fully and completely disclose the substance of conversations between Dr. Clyde Gibbs and Detective Christopher Robinson”; and (3) willfully failing “to fully and completely disclose the substance of conversations and emails as required by lawfully issued subpoena served upon Dr. Jonathan Privette.”

N.C. Gen. Stat. § 15A-903 requires “[t]he State to make available to the defendant the complete files of all law enforcement agencies, investigatory agencies, and prosecutors’ offices involved in the investigation of the crimes committed or the prosecution of the defendant.” N.C. Gen. Stat. § 15A-903(a)(1) (2011). The statute defines those relevant terms as follows:

- a. The term “file” includes the defendant’s statements, the codefendants’ statements, witness statements, investigating officers’ notes, results of tests and examinations, or any other matter or evidence obtained during the investigation of the offenses alleged to have been committed by the defendant. When any matter or evidence is submitted for testing or examination, in addition to any test or examination results, all other data, calculations, or writings of any kind shall be made available to the defendant, including, but not limited to, preliminary test or screening results and bench notes.
- b. The term “prosecutor’s office” refers to the office of the prosecuting attorney.

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6. The General Statutes do provide the State the right to appeal an adverse ruling on a Defendant’s motion to suppress, *see* N.C. Gen. Stat. § 15A-1445(b); however, no such motion is at issue in this appeal.

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b1. The term “investigatory agency” includes any public or private entity that obtains information on behalf of a law enforcement agency or prosecutor’s office in connection with the investigation of the crimes committed or the prosecution of the defendant.

N.C. Gen. Stat. § 15A-903(a)(1) (2011).

As a starting point, we note that this Court has interpreted the provisions of Section 15A-903 to require production by the State of *already existing documents*. The statute imposes no duty on the State to create or continue to develop additional documentation regarding an investigation. *See Allen*, \_\_ N.C. App. at \_\_, 731 S.E.2d at 529.<sup>7</sup> Accordingly, to the extent the trial court concluded the State violated statutory discovery provisions because it merely failed to *document* various conversations, it erred.

However, the trial court also determined that the State failed to disclose other, documented conversations. Specifically, the trial court found discoverable certain email exchanges between Dr. Gibbs, Detective Robinson, and Mr. Strout that gave context to the circumstances under which the bones were destroyed. Assuming, but without deciding, that the *documented* conversations which were not disclosed were in fact discoverable, the trial court’s order imposing sanctions remains in error.

“If the court imposes any sanction, it must make specific findings justifying the imposed sanction.” N.C. Gen. Stat. § 15A-910(d). As discussed above, the portions of the trial court’s order justifying the sanctions focus on the entirety of the State’s alleged misconduct, rather than its failure to disclose the specific communications that were discoverable. Furthermore, and perhaps most importantly, the order does not account for the fact that Defendant is in possession of the relevant information well before he stands trial. Thus, the trial court fails to detail the specific and continuing prejudice Defendant has suffered as result of the initial non-disclosure. In addition, the trial court does not explain how suppression of Dr. Privette’s or Detective Robinson’s testimony remedies the non-disclosure. Therefore the order does not bear any indication that the trial court “consider[ed] both the materiality of the subject matter and the totality of the circumstances surrounding [the] alleged failure to comply”

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7. Although *Allen* was interpreting a former version of N.C. Gen. Stat. § 15A-903, the principle remains the same.

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prior to finding suppression of their testimony “appropriate.” N.C. Gen. Stat. § 15A-910(b) (2011).

Therefore, because the lesser discovery sanctions rest upon (1) actions that are not discovery violations; or (2) a flawed prejudice analysis, we must vacate the portions of the trial court’s order suppressing related evidence as a discovery sanction. *See Blitz v. Agean, Inc.*, 197 N.C. App. 296, 312, 677 S.E.2d 1, 11 (2009) (holding that judicial actions based upon a misapprehension of law constitute an abuse of discretion).

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However, our decision with respect to the discovery sanctions issue in no way abrogates the authority of the judge presiding over Defendant’s trial to take any appropriate action necessary to ensure Defendant receives a fair trial. The trial judge should review the discovery violations issue as the record is further developed for the purposes of determining whether any violations occurred or whether the defense is prejudiced by either (1) the absence of those bones used by the OCME to make an identification or (2) additional information subject to discovery which has not yet been disclosed.

**IV. Conclusion**

For the foregoing reasons, we conclude the trial court erred by dismissing with prejudice the charge against Defendant on both constitutional and statutory grounds. Therefore, we reverse the trial court’s order insofar as it dismisses the charge against Defendant. We further conclude that the trial court’s imposition of lesser discovery sanctions was in error. We therefore vacate the portion of the trial court’s order imposing those lesser sanctions, without prejudice to the ability of the judge presiding over Defendant’s trial to take any appropriate action necessary to ensure Defendant receives a fair trial. Accordingly, the trial court’s order is reversed in part, vacated in part, and remanded for further proceedings consistent with this opinion.

REVERSED IN PART; VACATED IN PART; and REMANDED.

Judges ERVIN and McCULLOUGH concur.



**STATE v. THOMAS**

[225 N.C. App. 631 (2013)]

STATE OF NORTH CAROLINA

v.

FRANKLIN ROOSEVELT THOMAS, SR.

No. COA12-667

Filed 19 February 2013

**1. Satellite-Based Monitoring—highest possible level of supervision—low risk for offending—additional findings not supported**

The trial court erred in a satellite-based monitoring case by determining that defendant required the highest possible level of supervision and monitoring upon his release from prison for a sexual offense. The STATIC-99 risk assessment classified him as a low risk for reoffending and the trial court's additional findings were not supported by the evidence.

**2. Satellite-Based Monitoring—indecent liberties—offense against a minor—sexually violent offense**

The trial court erred in a satellite-based monitoring (SBM) case by concluding that defendant had committed an "offense against a minor" as defined by statute, thus subjecting him to SBM. Taking indecent liberties is not an offense against a minor; however, it is a sexually violent offense under N.C.G.S. § 14-208.6(5), and is therefore grounds for imposition of SBM, assuming all other requirements are met.

Appeal by defendant from order entered 14 February 2012 by Judge Forrest D. Bridges in Mecklenburg County Superior Court. Heard in the Court of Appeals 9 January 2013.

*Roy Cooper, Attorney General, by Joseph Finarelli, Special Deputy Attorney General, for the State.*

*Staples S. Hughes, Appellate Defender, by Andrew DeSimone, Assistant Appellate Defender, for defendant-appellant.*

STEELMAN, Judge.

Where the trial court's order for satellite-based monitoring (SBM) of defendant was based upon improper findings of fact, this matter is remanded for a new SBM hearing.

**STATE v. THOMAS**

[225 N.C. App. 631 (2013)]

**I. Factual and Procedural History**

Franklin Roosevelt Thomas, Sr., (defendant) was either dating or married to the mother of A.B., age 11 at the time of trial. A.B. disclosed that defendant had “touch[ed] her inappropriately.” Defendant was indicted on two counts of taking indecent liberties with a child. Pursuant to a plea agreement, defendant pled guilty to one count of indecent liberties. The trial court sentenced defendant to an active term of imprisonment of 16 to 20 months.

The trial court then conducted a hearing pursuant to N.C. Gen. Stat. § 14-208.40A for purposes of determining whether post-release satellite-based monitoring (SBM) was appropriate. The trial court found that defendant had been convicted of an offense against a minor and a sexually violent offense. The trial court found that defendant had not been classified as a sexually violent predator, was not a recidivist, and that the conviction offense was not an aggravated offense.

Prior to the hearing, a STATIC-99 risk assessment had been performed. Defendant received negative three points for being sixty years of age or older. He received one point for having a 1963 assault conviction, one point for having a 1968 conviction for “RAPE MISD” in another state, and one point for having four or more prior sentencing dates. The total points on the STATIC-99 risk assessment was zero, indicating a low risk of reoffending.

The trial court made “additional findings” that A.B. was traumatized, that defendant took advantage of a position of trust, and that defendant had a prior record for a sex offense. The court stated that these factors “create some concern for the court on the likelihood of recidivism.” The trial court concluded that defendant required the highest possible level of supervision and monitoring, and ordered that defendant enroll in SBM for 10 years following his release from prison.

Defendant appeals.

**II. Standard of Review**

In reviewing a trial judge’s findings of fact, we are “strictly limited to determining whether the trial judge’s underlying findings of fact are supported by competent evidence, in which event they are conclusively binding on appeal, and whether those factual findings in turn support the judge’s ultimate conclusions of law.”

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*State v. Williams*, 362 N.C. 628, 632, 669 S.E.2d 290, 294 (2008) (quoting *State v. Cooke*, 306 N.C. 132, 134, 291 S.E.2d 618, 619 (1982)).

[O]ur review requires us to consider whether evidence was presented which could support findings of fact leading to a conclusion that “the defendant requires the highest possible level of supervision and monitoring.” N.C. Gen.Stat. § 14–208.40B(c). If “the State presented no evidence which would tend to support a determination of a higher level of risk than the “moderate” rating assigned by the DOC[,]” then the order requiring defendant to enroll in SBM should be reversed. *Kilby*, \_\_\_ N.C. App. at \_\_\_, 679 S.E.2d at 434. However, if evidence supporting the trial court’s determination of a higher level of risk is “presented, it [is] . . . proper to remand this case to the trial court to consider the evidence and make additional findings [.]” *Id.*

*State v. Morrow*, 200 N.C. App. 123, 132, 683 S.E.2d 754, 761 (2009), *aff’d per curiam*, 364 N.C. 424, 700 S.E.2d 224 (2010).

### III. Consideration of Factors at SBM Hearing

In his first argument on appeal, defendant contends that the trial court erred in determining that he required the highest possible level of supervision and monitoring upon his release from prison when the STATIC-99 risk assessment classified him as a low risk for reoffending, and that the trial court’s “additional findings” were not supported by the evidence. We agree.

The North Carolina Department of Correction adopted the STATIC-99 to assess risk of reoffending among sex offenders. The STATIC-99 is an “actuarial instrument designed to estimate the probability of sexual and violent recidivism among male offenders who have already been convicted of at least one sexual offense against a child or non-consenting adult.” *Id.* at 125 n.3, 683 S.E.2d at 757 n.3.

In the instant case, the STATIC-99 showed a total score of zero, indicating a low risk of reoffending. We have held that where an offender is determined to pose only a low or moderate risk of reoffending, the State must present additional evidence to support a determination that the offender requires the highest possible level of supervision and monitoring. *Id.* at 132, 683 S.E.2d at 761. These additional findings must be supported by “competent record evidence[,]”

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*State v. Jarvis*, \_\_\_ N.C. App. \_\_\_, \_\_\_, 715 S.E.2d 252, 259 (2011), and must support the trial court's ultimate conclusion of law.

In the instant case, the trial court made an additional finding of fact that "[A.B.] is suffering significant emotional trauma[.]" This finding was based solely on unsworn statements of [A.B.]'s mother. In its brief, the State conceded that "the statements of A.B.'s mother at the time Defendant was sentenced were not themselves competent evidence. A.B.'s mother did not testify under oath and the trial court did not give Defendant . . . the opportunity to cross-examine [her]."

Because these unsworn statements were neither stipulated nor assented to by defendant, this evidence was not sufficient to support the trial court's finding. *See State v. Green*, \_\_\_ N.C. App. \_\_\_, \_\_\_, 710 S.E.2d 292, 296 (2011).

The trial court also found that defendant had "a prior record although extremely old of another sex offense." However, the STATIC-99 assessment had already taken into account defendant's prior offense. The purpose of allowing the trial court to make additional findings is to permit the trial court to consider factors not part of the STATIC-99 assessment. In *Morrow*, we held that, where an offender is determined to pose only a low or moderate risk of reoffending, the State must offer additional evidence, and the trial court make additional findings, in order to justify a maximum SBM sentence. *See Morrow*, 200 N.C. App. at 132, 683 S.E.2d at 761; *Jarvis*, \_\_\_ N.C. App. at \_\_\_, 715 S.E.2d at 259. To allow these "additional findings" to include matters already addressed in the STATIC-99 assessment would obviate the utility of the assessment. We hold that these "additional findings" cannot be based upon factors explicitly considered in the STATIC-99 assessment.

The trial court further found that the "reccurance [sic] of this Defendant's sexual [sic] deviant [sic] behavior, many years after the prior conviction and the present age of Defendant create some concern for the court on the likelihood of recidivism." The STATIC-99 took defendant's age into account, and the assessment determined that defendant's age reduced the likelihood of recidivism. Since this factor had already been considered in the STATIC-99 assessment, it could not constitute an "additional finding."

The trial court considered improper factors in making its determination that defendant required the highest possible level of supervision. Nonetheless, the State did present evidence which could tend to support a determination of a higher level of risk. The SBM order is

## STATE v. THOMAS

[225 N.C. App. 631 (2013)]

therefore vacated and this matter is remanded to the trial court for a new SBM hearing.

IV. “Offense Against a Minor”

**[2]** In his second argument, defendant contends that the trial court erred in concluding that he had committed an “offense against a minor” as defined by statute, thus subjecting him to SBM. We agree.

A person cannot be subjected to SBM unless that person has a “reportable conviction.” N.C. Gen. Stat. § 14-208.40A(a) (2011); N.C. Gen. Stat. § 14-208.40B(a). A reportable conviction can be “a final conviction for an offense against a minor.” N.C. Gen. Stat. § 14-208.6(4)(a). An “offense against a minor” is defined as:

any of the following offenses if the offense is committed against a minor, and the person committing the offense is not the minor’s parent: G.S. 14-39 (kidnapping), G.S. 14-41 (abduction of children), and G.S. 14-43.3 (felonious restraint). The term also includes the following if the person convicted of the following is not the minor’s parent: a solicitation or conspiracy to commit any of these offenses; aiding and abetting any of these offenses.

N.C. Gen. Stat. § 14-208.6(1m).

In the instant case, the trial court found that defendant had been convicted of an “offense against a minor under G.S. 14-208.6(1m).” Defendant was not convicted of kidnapping, child abduction, or felonious restraint, and thus did not commit an offense against a minor as set forth in N.C. Gen. Stat. § 14-208.6(1m). The State concedes that the trial court erred in concluding that defendant’s conviction for taking indecent liberties was an offense against a minor.

We note, however, that an offense against a minor is not the only basis for a reportable conviction. A “sexually violent offense” is likewise a reportable conviction. N.C. Gen. Stat. § 14-208.6(4)(a). Taking indecent liberties with a child is a sexually violent offense under the statute, N.C. Gen. Stat. § 14-208.6(5), and is therefore grounds for imposition of SBM, assuming all other requirements are met. Upon remand, the trial court may not hold that defendant’s conviction was an offense against a minor.

VACATED AND REMANDED.

Judges STEPHENS and McCULLOUGH concur.

**STATE v. WILLIAMS**

[225 N.C. App. 636 (2013)]

STATE OF NORTH CAROLINA

v.

DANTE WILLIAMS

No. COA12-947

Filed 19 February 2013

**1. Criminal Law—burden of proof—evidence suppression hearing**

The trial court did not improperly place the burden of proof on defendant at his evidence suppression hearing where there was initially some confusion about whether the State or defendant had the burden of proof, defendant volunteered to proceed and called the two officers involved in the arrest to testify, and no other witnesses testified at the suppression hearing. The fact that defendant presented evidence first is not determinative of which party had the burden of proof. It was noted that the court's order should be in writing and should state the applicable burden of proof and whether it was met by the State.

**2. Arrest—driving while impaired—probable cause**

The findings supported the trial court's conclusion that an officer had probable cause to arrest defendant for driving while impaired based on the circumstances in which defendant was found following an accident.

Appeal by defendant from judgment entered 13 September 2011 by Judge Craig Croom in Wake County Superior Court. Heard in the Court of Appeals 30 January 2013.

*Attorney General Roy Cooper by Assistant Attorney General, Joseph E. Elder, for the State.*

*Reece & Reece by Michael J. Reece for defendant-appellant.*

STEELMAN, Judge.

At the hearing on defendant's motion to suppress, the trial court did not place the burden of proof upon defendant. The trial court did not err in finding that the officers had probable cause to arrest defendant for driving while impaired and denying defendant's motion to suppress.

**STATE v. WILLIAMS**

[225 N.C. App. 636 (2013)]

**I. Factual and Procedural Background**

Police responded to a one-car accident at approximately 4:00 a.m. on 20 January 2011 in Morrisville. When police arrived, Dante Daon Williams (defendant) was lying on the ground behind the car and appeared very intoxicated. No other person was present when police arrived. Police arrested defendant for driving while impaired. Defendant was uncooperative and resisted arrest. As the officers walked defendant to the police car, defendant spit on an officer's face.

On 22 March 2011, defendant was indicted for the felony of malicious conduct by a prisoner and being an habitual felon. Defendant made a motion to suppress the arrest for lack of probable cause and all evidence resulting from the arrest. The trial court denied defendant's motion concluding that based on defendant's proximity to the vehicle, the absence of any other person in the area, and defendant's strong odor of alcohol, bloodshot eyes, slurred speech, and extreme unsteadiness on his feet, the officer had probable cause to arrest defendant for driving while impaired. On 13 September 2011, a jury found defendant guilty of malicious conduct by a prisoner. He subsequently pled guilty to being an habitual felon. Defendant was sentenced as a Level III offender from the mitigated range to an active term of imprisonment of 72 to 96 months.

Defendant appeals.

**II. Burden of Proof**

[1] In his first argument on appeal, defendant contends that the trial court improperly placed the burden of proof on defendant at the hearing of his motion to suppress and therefore, erred in denying his motion to suppress. We disagree.

The transcript of the suppression hearing indicates that at the outset of the hearing there was some confusion concerning whether the State or defendant had the burden of proof. However, counsel for defendant volunteered to proceed and called the two officers involved in the arrest to testify. No other witnesses testified at the suppression hearing.

Initially the burden is on the defendant to show that the motion to suppress is timely and in proper form. *E.g.*, *State v. Conard*, 54 N.C. App. 243, 245, 282 S.E.2d 501, 503 (1981) ("The burden is on the defendant to demonstrate that he has made his motion to suppress in compliance with the procedural requirements of [N.C. Gen. Stat. §§ 15A-971 to 980]; failure to carry that burden waives the right

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to challenge evidence on constitutional grounds.”). Once the defendant has done so, “the burden is upon the [S]tate to demonstrate the admissibility of the challenged evidence[.]” *State v. Cheek*, 307 N.C. 552, 557, 299 S.E.2d 633, 636-37 (1983). “To do this the [S]tate must persuade the trial judge, sitting as the trier of fact, by a preponderance of the evidence that the facts upon which it relies to sustain admissibility and which are at issue are true.” *Id.* The North Carolina Supreme Court has held:

Although the party who has the burden of proof is generally the party who first puts on evidence, the order of presentation at trial is a rule of practice, not of law, and it may be departed from whenever the court, in its discretion, considers it necessary to promote justice. Since the order of proof in a criminal trial is largely within the discretion of the trial judge, inversion of the order is not grounds for reversal unless the court abuses its discretion and defendant establishes that he was prejudiced thereby. . . .

. . . The order of proof has no effect on the burden of proof or the burden of going forward with the evidence, since the order of proof is merely a matter of practice without legal effect.

*State v. Temple*, 302 N.C. 1, 4-5, 273 S.E.2d 273, 276 (1981)(internal citations omitted).

In the instant case, there is no indication from the transcript or the order entered by the trial court that the burden of proof was shifted from the State to defendant. The fact that defendant presented evidence first is not determinative of which party had the burden of proof.

We note that it is the duty of the presiding judge to have a clear understanding of the burden of proof and procedure involved in conducting a suppression hearing. Since the State has the burden of proof, it should proceed with presenting evidence to the court. The court’s ruling should be in writing. *State v. Moul*, 95 N.C. App. 644, 646, 383 S.E.2d 429, 431 (1989); *see also* N.C. Gen. Stat. § 15A-977(f) (2011). The order should also clearly state the applicable burden of proof and whether it was met by the State.

This argument is without merit.



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**III. Probable Cause to Arrest**

**[2]** In his second argument, defendant contends that the officers did not have probable cause to arrest him. We disagree.

**A. Standard of Review**

“The standard of review in evaluating the denial of a motion to suppress is whether competent evidence supports the trial court’s findings of fact and whether the findings of fact support the conclusions of law.” *State v. Biber*, 365 N.C. 162, 167-68, 712 S.E.2d 874, 878 (2011). When “the trial court’s findings of fact are not challenged on appeal, they are deemed to be supported by competent evidence and are binding on appeal.” *Id.* at 168, 712 S.E.2d at 878. Conclusions of law are reviewed *de novo*. *Id.*

**B. Analysis**

Under the North Carolina General Statutes, an officer may arrest a person without a warrant when he has probable cause to believe the person has (1) committed a felony, (2) committed a misdemeanor and, unless immediately arrested, will not be apprehended, may cause physical injury to himself or others, or damage property, or (3) committed one of several enumerated misdemeanors, including impaired driving. N.C. Gen. Stat. § 15A-401(b)(2011). Our Supreme Court has defined probable cause for an arrest as

[A] reasonable ground of suspicion, supported by circumstances sufficiently strong in themselves to warrant a cautious man in believing the accused to be guilty. . . . To establish probable cause the evidence need not amount to proof of guilt, or even to prima facie evidence of guilt, but it must be such as would actuate a reasonable man acting in good faith.

*State v. Harris*, 279 N.C. 307, 311, 182 S.E.2d 364, 367 (1971)(quoting 5 Am. Jur. 2d *Arrests* § § 44, 48 (1962)).

In the instant case, the trial court made the following findings of fact:

3. Officer Miller observed the Defendant lying behind the car on the ground near the trunk. The Defendant’s shirt was pulled over his head and his head was in the sleeve hole of the shirt.

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4. The Defendant appeared unconscious. Officer Miller and his sergeant tried to arouse the Defendant. The Defendant woke up and started chanting. His speech was slurred. He had a strong odor of alcohol. He stood up and fell back. He was extremely unsteady on his feet. He had bloodshot eyes.

...

6. The keys were in the ignition, and the car was not running.

7. Officer Gilbert of the Morrisville Police searched the area and found no one in the woods. He noted no other signs of people and no tracks in the woods.

The trial court's findings of fact would support "a reasonable ground of suspicion, supported by circumstances sufficiently strong in themselves to warrant a cautious man in believing the accused to be guilty" of impaired driving. *See id.* The findings of fact support the trial court's conclusion of law that "[b]ased on the Defendant's proximity to the car involved in an accident, no one else was in the area, strong odor of alcohol, slurred speech, bloodshot eyes, and extremely unsteady [sic] on his feet. Officer Miller had probable cause to arrest the Defendant for Driving While Impaired[.]"

Defendant's argument is without merit.

Based upon the foregoing rulings, we need not address defendant's remaining arguments.

NO ERROR.

Judges GEER and HUNTER, JR., Robert N. concur.

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[225 N.C. App. 641 (2013)]

TIMBER INTEGRATED INVESTMENTS, LLC, A NORTH CAROLINA LIMITED LIABILITY COMPANY, AND MOUNTAIN WORKS ENTERPRISES, LLC, A NORTH CAROLINA LIMITED LIABILITY COMPANY, PLAINTIFFS

v.

LARRY WELCH, JOAN MISHKIN, RONALD MISHKIN AND THE BALSAM GROUP, LLC, DEFENDANTS, AND LARRY WELCH, COUNTERCLAIMANT

v.

TIMBER INTEGRATED INVESTMENTS, LLC, A NORTH CAROLINA LIMITED LIABILITY COMPANY, AND MOUNTAIN ENTERPRISES, LLC, A NORTH CAROLINA LIMITED LIABILITY COMPANY, HAROLD HEATHERLY, AND PHILLIP DANIEL HEATHERLY, DEFENDANTS  
BY COUNTERCLAIM

No. COA12-767

Filed 19 February 2013

**Pretrial Proceedings—summary judgment motion—consideration of affidavits—prejudicial error**

The trial court erred in a case concerning the purchase of a tract of real property by failing to consider plaintiffs' evidence during a hearing on defendants' motion for summary judgment. The court's error was prejudicial as the depositions contained a sufficient forecast of evidence to establish the existence of a genuine issue of material fact concerning the individual liability of defendants.

Appeal by Plaintiffs from Order entered 29 October 2010 by Judge James U. Downs and Judgment entered 23 February 2012 by Judge Bradley B. Letts in Haywood County Superior Court. Heard in the Court of Appeals 28 November 2012.

*Jeffrey W. Norris & Associates, PLLC, by Jeffrey W. Norris and Jerad R. Davis, for Plaintiffs-Appellants.*

*David R. Payne, P.A., by David R. Payne, for Defendants-Appellees.*

STEPHENS, Judge.

*Facts and Procedural History*

This case concerns the purchase of a 163-acre tract of real property located at 122 Skyland Road in Waynesville, North Carolina ("the Property" or "the Land"). A portion of the Land was previously an apple orchard, but has since become contaminated with arsenic and other substances. As a result, the Property cannot be used for resi-

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dential purposes. Plaintiffs Timber Integrated Investments, LLC (“Timber”) and Mountain Works Enterprises, LLC (“Mountain”) purchased the Property from the Balsam Group (“Balsam”) on 22 November 2005. Timber and Mountain were formed by Plaintiffs Harold Heatherly (“Harold”) and his son Danny Heatherly (“Danny”), respectively. Balsam was formed by Defendants Larry Welch (“Welch”) and Joan Mishkin (“Joan”). Plaintiffs contend that Joan’s husband, Ronald Mishkin (“Ron”), also participated in Balsam’s organization. This appeal arises from two judicial proceedings in Haywood County, a summary judgment order (“the 2010 order”) and the findings of fact, conclusions of law, and judgment which followed (“the 2012 judgment”).

The Property was originally owned by two siblings, Carolyn Metts and Paul Davis (collectively, “the Siblings”), who had inherited the land and were interested in selling it. In 2003, Defendants Welch and Ron, along with a third party (“the Third Party”), expressed an interest in purchasing the Property from Metts and Davis. Over the course of discussions about that possibility, Metts informed Welch that the Property could be polluted with a number of contaminants, including arsenic. While Metts discussed the purchase with Welch and Ron, Welch also began talking with Harold Heatherly about selling the Property to Harold. Neither Harold nor his son Danny had visited the site and neither was aware of the potential arsenic contamination.

Later that year, Welch, Ron, and the Third Party executed a contract under the name Arbor Investment Group, LLC, to purchase the Property from the Siblings. That purchase was contingent on an acceptable soil-contamination evaluation. When the soil-contamination evaluation returned, it confirmed Metts’s prior statement to Welch—that the Property was contaminated with significant amounts of arsenic and could not be used for residential purposes. As a result, the Third Party withdrew from the transaction. Because of the Third Party’s unwillingness to enter the contract, Welch and Ron also terminated the agreement. Welch then sent a letter to ReMax Realty (“ReMax”), which had served as the realtor for both parties, concluding that “[t]he level of arsenic in the soil was found to be much higher than had been expected . . . [and] is entirely too much difference to proceed toward a closing of the subject property.”

Despite terminating the contract with the Siblings, Welch maintained communication with Harold Heatherly and assured Harold that he and Ron were getting the matter “resolved” with the Siblings. In an attempt to explain things, Welch falsely blamed the delay on a

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family dispute between Metts and Davis. During that time, Welch continued to represent to Harold that the Property would be an excellent location for residential development.

Two years after the original, failed contract from 2003, Welch contacted Harold with the hope of re-initiating talks regarding purchase of the Property. Welch explained that the fictional Metts-Davis feud had been resolved and again described the Property as well-suited for residential use. For a second time, Harold expressed an interest in purchasing the property.

On 25 August 2005, Welch and Joan entered into a contract to sell the Property to Timber. The contract listed Welch and Joan individually as “Seller[s].” Above their respective names, Welch and Joan had also written “[doing business as] Balsam Group.” The contract stipulated that the land did not contain any “existing environmental contamination.” Five days later, on 30 August 2005, Joan entered into a second contract and offer to purchase the Property from Metts and Davis, identifying herself as the Buyer and including the words “By: The Balsam Group & or Assigns” typed below her name. Welch’s wife, Marge Welch, is listed as the realtor on the contract. The contract contained the following addendum, which

specifically represent[ed] to Buyer that an apple orchard was part of the subject property and Buyer is accepting said property in “as is” condition, fully aware that the area where the apple orchard was located could contain environmental conditions that would need to be rectified before the area is used for residential purposes.

Six days after Joan contracted with the Siblings and eleven days after Joan and Welch contracted with Timber, on 6 September 2005, Balsam was formed in the State of Delaware. According to the 2012 trial court, Balsam was formed by Welch, Joan, and Ron for the exclusive purpose of committing fraud against Plaintiffs. That court also determined that “[e]ach of the members/partners engaged in and participated in a scheme to defraud plaintiffs and each of them knowingly worked in concert with the others throughout all times relevant hereto.”<sup>1</sup>

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1. Though Defendants have not appealed the trial court’s 2012 judgment, they disagree with these findings in their brief, noting that “Larry Welch and Joan Mishkin were the only members of The Balsam Group, LLC” and contending that Plaintiffs failed to support their contentions with regard to any facts that supported claims against the Defendants personally.

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After Timber agreed to purchase the Land from Welch and Joan, Harold and Danny “undertook a variety of steps to investigate the Property and to conduct reasonable due diligence.” Harold reviewed the contract, searched the Haywood County public records, and walked the boundaries of the property. Harold also talked with some of the neighboring landowners, one of whom mentioned that he “had heard that some medical waste may have been dumped on a portion of the Property.” Harold and the neighbor inspected that portion of the Land, but they were not able to uncover evidence of medical waste. According to the 2012 judgment, when Harold questioned Welch about the waste, “Welch stated that he did not know of any such waste.” When Harold asked if there was anything else he should know, “like any other waste or contamination,” Welch informed him that he was not aware of any. Based on those findings, the 2012 court determined that Plaintiffs would not “have had any interest in the Property had they known it could not be used for residential purposes.” During continued meetings between Harold, Welch, and Harold’s attorney at that time, Welch persistently represented the Property as free of contamination.

On 28 November 2005, approximately two months after the original purchase contracts were entered into, Balsam acquired the property from Metts and Davis.<sup>2</sup> That same day, Balsam sold the property to Timber and Mountain. Approximately one week after that, Danny learned of the contamination after speaking with a local attorney. The two had been discussing their recent real estate purchases, and the attorney mentioned Danny’s purchase of the Property to another individual who worked at ReMax, which had been involved in the transaction between the Siblings and Balsam. That individual knew about the arsenic contamination and promptly called Danny to ensure that he was aware of the situation. Danny informed his father, and Harold quickly confronted Welch. Welch admitted to the situation, but “played [it] down,” according to the 2012 judgment. As a consequence, Harold informed Welch that Timber and Mountain were prepared to undo the transaction in order to “fix” the Defendants’ failure to disclose the contamination. Welch asked for time to discuss this possibility with his partners, “especially Ron,” but “[a]fter months of delays,” Welch, Joan, and Ron informed Harold that they were not willing to undo the transaction. Plaintiffs filed suit.

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2. The 2012 judgment lists the day of closing as “November 22, 2008.” However, all other documentation in the record, including the General Warranty Deed signed by Timber, Mountain, and Balsam, lists the closing date as 28 November 2005.

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On 23 November 2009, Plaintiffs moved for partial summary judgment on grounds that: (1) the corporate veil surrounding Balsam should be pierced and the parties should be held individually liable, and (2) Ronald Mishkin was, in fact, a partner in Balsam and should also be held individually liable. Defendants responded on 4 December 2009 by asserting that there were genuine issues of material fact regarding Plaintiffs' allegations and moved for partial summary judgment on a third, unrelated matter. Five days later, on 11 December 2009, the trial court denied Defendants' motion for partial summary judgment. The next year, on 22 September 2010, Defendants filed another motion for summary judgment, which simply alleged that there was no genuine issue of material fact raised by the pleadings, depositions, answers to interrogatories, and admissions of fact and, thus, judgment was proper as a matter of law. Defendants' motion provided no empirical or legal support for its assertions. Plaintiffs responded and renewed their motion for summary judgment in mid-October of 2010. They argued that their claims were supported by "the pleadings filed in this matter, depositions taken and exhibits thereto, the affidavits filed herewith or prior to the hearing, and such other matters as may be properly presented to the Court . . . ." In further support of their motion, Plaintiffs filed affidavits of both Harold and Danny Heatherly, which asserted, *inter alia*, that neither was aware of the Property's condition when the Land was purchased by Timber and Mountain. Defendants responded to Plaintiff's motion on Thursday, 21 October 2010.

The next Monday, on 25 October 2010, the Haywood County Superior Court, the Honorable James U. Downs presiding, held a hearing on the parties' summary judgment motions. Four days later, on 29 October 2010, the trial court entered an order (1) granting Defendants' motion for summary judgment "with respect to the claims asserted by the Plaintiff[s] against the individual defendants Larry Welch, Joan Mishkin and Ronald Mishkin," (2) denying Defendants' motion with regard to Balsam, and (3) denying Plaintiffs' motion for partial summary judgment against Defendants.

One year and four months later, on 23 February 2012, the Haywood County Superior Court, the Honorable Bradley B. Letts presiding, entered judgment as to Balsam. After carefully delineating the facts, the 2012 trial court concluded that "Defendant Balsam Group, by and through its members/partners, committed fraud. . . . violated the Unfair and Deceptive Trade Practices statute. . . . [and] made negligent misrepresentations." The court also found that Plaintiffs had

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been damaged and were entitled to recover damages. Accordingly, the court entered judgment in favor of Plaintiffs and against Balsam for \$5,442,785.12. The court then trebled that number to \$16,328,355.36 and awarded prejudgment interest at \$2,406,158.38, punitive damages at \$10,000,000.00, and costs at \$170,417.45.

Plaintiffs appeal the 2010 order to the extent that it granted Defendants' motion for summary judgment and excluded Defendants from individual liability. Plaintiffs also appeal the 2012 judgment, "[but] only to the extent that the individual defendants Larry Welch, Joan Mishkin, and Ronald Mishkin were not subject to the judgment because of the [2010 trial court order] granting summary judgment in [Defendants'] favor prior to the trial."

*Standard of Review*

"Our standard of review of an appeal from summary judgment is de novo; such judgment is appropriate only when the record shows that 'there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law.'" *In re Will of Jones*, 362 N.C. 569, 573, 669 S.E.2d 572, 576 (2008) (quoting *Forbis v. Neal*, 361 N.C. 519, 523–24, 649 S.E.2d 382, 385 (2007)).

*Discussion*

Plaintiffs contend that the 2010 trial court erred in granting Defendants' motion for summary judgment as to Plaintiffs' claims against Larry, Joan, and Ron, individually. In support of that assertion, Plaintiffs argue, *inter alia*, that (1) there is a genuine issue of material fact as to whether Ron was a member/partner of Balsam, and (2) Balsam's members/partners should be held personally liable. In addition, Plaintiffs contend (3) the trial court erred by failing to consider the evidence presented by Plaintiffs at the summary judgment hearing. We agree. For purposes of discussion, we first address Plaintiffs' third contention—that the trial court erred by failing to consider Plaintiffs' evidence during the 25 October 2010 hearing on Defendants' motion for summary judgment.

*I. The 2010 Summary Judgment Hearing*

In response to Plaintiffs' assertion that Balsam was completely dominated by Welch, Joan, and Ron, the following exchange occurred between the trial court and counsel for Plaintiffs during the 2010 summary judgment hearing:



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THE COURT: How have you got that articulated in your response to a summary judgment motion or in support of the one that you're after?

[PLAINTIFFS' ATTORNEY]: We have got that—we've got that articulated in the depositions. It is—

THE COURT: Now, listen to me. You and your predecessors have had this case for going on four years. And I don't think it's—it's wise at all to ask anybody—me or anybody else—to go fishing through your depositions to ferret out a fact that supports some issue that's in dispute. It's your obligation to put up affidavits about what exists and what doesn't exist. Fair enough?

[PLAINTIFFS' ATTORNEY]: Yes, sir.

THE COURT: So let's—now, what I'm asking is forget the depositions. . . .

Plaintiffs contend that the trial court's failure to consider the depositions constitutes reversible error because Plaintiffs were not given a "reasonable opportunity" to present material in opposition to Defendants' motion for summary judgment, citing *Locus v. Fayetteville State Univ.*, 102 N.C. App. 522, 402 S.E.2d 862 (1991). We are not persuaded by Plaintiffs' reliance on *Locus*, but find error nonetheless.

As Plaintiffs rightly note, we determined in *Locus* that the trial court had erred in granting summary judgment for the defendants because it had refused to consider the plaintiff's depositions and not given the plaintiff "a *reasonable opportunity* to oppose the defendants' Rule 56 motion for summary judgment." *Id.* at 528, 402 S.E.2d at 866 (emphasis added). That decision is not applicable here. In *Locus*, the court based its decision on the trial court's conversion of defendants' Rule 12(b)(6) motion to a Rule 56 motion for summary judgment. *Id.* at 526, 402 S.E.2d at 865. When a trial court converts a party's 12(b)(6) motion to dismiss into one for summary judgment under Rule 56, "all parties shall be given a reasonable opportunity to present all material made pertinent to such a motion by Rule 56." N.C. Gen. Stat. § 1A-1, Rule 12(b) (2011). This is because

Rule 12(b) clearly contemplates the case where a party is "surprised" by the treatment of a Rule 12(b)(6) motion as one for summary judgment; it affords such a party a reasonable opportunity to oppose the motion with her own materials made pertinent to such a motion.

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*Locus*, 102 N.C. App. at 528, 402 S.E.2d at 866. In this case, Plaintiffs were not subjected to the surprise resulting from the conversion of a Rule 12(b)(6) motion into a summary judgment motion. Therefore, because the trial court's 25 August 2010 hearing in this case was not based on a converted motion to dismiss for failure to state a claim under Rule 12(b)(6), we hold that the 2010 trial court was under no obligation to give Plaintiffs a "reasonable opportunity" to present all materials. See *Raintree Homeowners Ass'n v. Raintree Corp.*, 62 N.C. App. 668, 673, 303 S.E.2d 579, 582 (1983) ("It is significant that the rule provides a 'reasonable opportunity' rather than requiring that the presentation of materials be in accordance with Rule 56.>").

Nonetheless, "[i]t has long been the law in North Carolina that in granting or denying a motion for summary judgment under N.C. Gen. Stat. § 1A-1, Rule 56, the trial court may consider the pleadings, depositions, interrogatories, and admissions on file, together with any affidavits which are before the court." *Murdock v. Chatham Cnty.*, 198 N.C. App. 309, 315, 679 S.E.2d 850, 855 (2009) (internal quotation marks, citations, and ellipsis omitted). Rule 56 gives the trial court discretion over whether to consider certain evidence when ruling on a summary judgment motion. That discretion is not so broad, however, as to allow the trial court to flatly refuse to consider competent and potentially relevant evidence that has been offered by one of the parties.

Summary judgment provides a drastic remedy and should be cautiously used so that no one will be deprived of a trial on a genuine, disputed issue of fact. The moving party has the burden of clearly establishing the lack of [a] triable issue, and his papers are carefully scrutinized and *those of the opposing party are indulgently regarded*.

*Koontz v. City of Winston-Salem*, 280 N.C. 513, 518, 186 S.E.2d 897, 901 (1972). "The goal of summary judgment is to allow the disposition before trial of an unfounded claim or defense," *Weber v. Holland*, 115 N.C. App. 160, 162, 443 S.E.2d 746, 747 (1994), and in pursuit of that goal the trial court "should consider the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits to determine if there are genuine issues of material fact." See *Lavelle v. Schultz*, 120 N.C. App. 857, 861-62, 463 S.E.2d 567, 570 (1995) (quotation marks omitted) (quoting *Meyer v. McCarley & Co.*, 288 N.C. 62, 67-68, 215 S.E.2d 583, 586 (1975)). Accordingly, the trial

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court has an obligation to “indulgently regard” the opposing party’s papers on a summary judgment motion.

The 2010 summary judgment hearing transcript indicates that the court in this case disregarded that obligation. When Plaintiffs attempted to present their evidence, the trial court abruptly cut off counsel for Plaintiffs with the words “[n]ow listen to me” and refused to consider Plaintiffs’ depositions. Though the court couched its refusal in terms of an unwillingness to “ferret out” certain facts in Plaintiffs’ library of evidence, we find nothing in the transcript to suggest that Plaintiffs had failed to submit specific, detailed, and well-researched evidence of their claims. Rather, the trial court simply informed Plaintiffs that they needed to “forget the depositions” altogether. This is a violation of the court’s obligation in a summary judgment hearing, and we hold that the trial court committed error.

*II. The Corporate Veil*

In order to determine whether the trial court’s error was harmless or prejudicial, we review Plaintiffs’ first contention, that there is a genuine issue of material fact concerning the individual liability of Defendants. In doing so, we consider the depositions and other evidence that was available for review by the trial court at its 2010 summary judgment hearing.

During that hearing, counsel for the Defendants argued to the court that “[t]he affidavits that I have presented do clearly indicate that [Balsam] was formed, and these people—the two members [of Balsam] were Jones<sup>3</sup> and Larry [Welch]. That’s it. There’s been no refuting affidavits to that fact.” Continuing that argument, Defendants now contend that there are simply “no facts which supported the claims against Larry Welch, Joan Mishkin and Ronald Mishkin, personally or the concept that somehow the veil . . . should be pierced.” We disagree.

In his 18 January 2008 deposition, Welch testified that Balsam was solely comprised of himself and Joan, with each person having a 50-50 ownership interest in the company. Welch also admitted, however, that “she, I, and him”—referring to Joan, himself, and Ron, respectively—were involved in the organization’s decision-making processes. When asked why Joan was a member of Balsam and Ron

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3. Given the context of this case and the lack of any party named “Jones,” the transcription “Jones” appears to be either a misstatement by the attorney or a mistake by the court reporter, intended in either case as a reference to “Joan” Mishkin.

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was not, Welch responded “[t]hat’s the way [Ron] wanted it.” As the deposition progressed, Welch went on to categorize himself as the manager of the organization and affirmed that the company’s only transaction was the one concerning this lawsuit. He also noted that Balsam was formed “on the internet” like the other “[t]hree or four” LLCs in which he held an ownership interest. When asked about Balsam’s operating agreement, Welch expressed confusion about the nature of such a document, eventually asserting that the company had one. In answering that question, Welch also noted, variously, that (1) “we have our meetings. We call each other. We talk to each other occasionally on—you know, if there’s business to be done,” and (2) he “and the Mishkins” had drafted the operating agreement together. When asked about his meeting with Harold—who had just learned of the contamination and was then seeking to undo the deal—the following colloquy occurred between Welch (here, “A”) and Plaintiffs’ attorney (here, “Q”):

A . . . . I think at the time, if I’m not mistaken, I told Mr. Heatherly that, you know, before I could do anything, I had to talk with my partner.

Q Go ahead. I’m listening.

A And I think we had our breakfast and left.

Q Did you thereafter talk to your partner about it?

A Oh, yes.

Q That’s [Ron] we’re referring to?

A Yes. a [sic]

Q Tell me about that conversation.

A Well, I explained the situation to him, and, I mean, you know, he was—he was not—you know, he was not willing to—you know, to undo anything.

During his 8 June 2009 deposition, Welch went on to confirm that, in the time leading up to Balsam’s purchase of the Land, Ron had contacted him to ask if the property was still available. He clarified that Joan had provided the money for the down payment on the Property and affirmed the statement that “[Ron] had put you in charge of [selling the property to the Heatherlys].” Welch also clarified that Balsam had never filed tax returns.

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Joan provided additional details in her 9 June 2009 deposition. There she stated that she had become a member of Balsam, instead of her husband, because she was “trying to establish [her] own credit, get [her] own credit cards, [and] have [her] own stocks . . .” She also acknowledged that the money she contributed to go into Balsam belonged to both her and Ron and affirmed that “it wasn’t particularly important which account it came from.”

In his deposition, taken that same day, Ron testified that he did not have any relationship with Balsam. At the beginning of the deposition, he denied “know[ing] any of these people,” but affirmed that he is married to Joan Mishkin. When asked who Balsam’s members were, Ron replied, “I know Larry Welch and I think Joan Mishkin,” but stated that he was not aware of any other members. Concerning Balsam’s sale of the property, Ron avowed that he was uninvolved, stating: “Now, I don’t know because I wasn’t part of it, but that was my understanding, that [Welch] was approached by someone doing bush hogging or something to buy the property.” When asked how he learned this information, Ron testified that he heard it “[o]ver dinner with [Welch].” Throughout the deposition, Ron disavowed any decision-making authority over or business relationship with Balsam.

“It is well recognized that courts will disregard the corporate form or ‘pierce the corporate veil,’ and extend liability for corporate obligations beyond the confines of a corporation’s separate entity, whenever necessary to prevent fraud or to achieve equity.” *Glenn v. Wagner*, 313 N.C. 450, 454, 329 S.E.2d 326, 330 (1985). In North Carolina, we employ the “instrumentality rule to determine whether to disregard the corporate entity and hold parent or affiliated corporations or shareholders liable for the acts of a corporation.” *East Mkt. St. Square, Inc. v. Tycorp Pizza IV, Inc.*, 175 N.C. App. 628, 632-33, 625 S.E.2d 191, 196 (2006) (quotation marks omitted). This rule provides that “the corporate entity will be disregarded and the corporation and the shareholder treated as one and the same person, it being immaterial whether the sole or dominant shareholder is an individual or another corporation,” if that corporation “is so operated that it is a mere instrumentality or *alter ego* of the sole or dominant shareholder and a shield for his activities in violation of the declared public policy or statute of the State[.]” *Id.* at 633, 625 S.E.2d at 196 (quoting *Henderson v. Fin. Co.*, 273 N.C. 253, 260, 160 S.E.2d 39, 44 (1968) (emphasis in original)).

We consider three elements when evaluating whether to pierce the corporate veil under the instrumentality rule:

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- (1) Control, not mere majority or complete stock control, but complete domination, not only in finances, but of policy and business practice in respect to the transaction attacked so that the corporate entity as to this transaction had at the time no separate mind, will or existence of its own; and
- (2) Such control must have been used by the defendant to commit fraud or wrong, to perpetrate the violation of a statutory or other positive legal duty, or a dishonest and unjust act in contravention of [the] plaintiff's legal rights; and
- (3) The aforesaid control and breach of duty must proximately cause the injury or unjust loss complained of.

*Glenn*, 313 N.C. at 455, 329 S.E.2d at 330 (citation omitted). When evaluating whether those elements are present in any one particular factual scenario, we consider the following factors:

1. Inadequate capitalization ("thin corporation");
2. Non-compliance with corporate formalities;
3. Complete domination and control of the corporation so that it has no independent identity; and
4. Excessive fragmentation of a single enterprise into separate corporations.

*Id.* at 455, 329 S.E.2d at 330–31. Other factors that may be considered when determining whether to pierce the veil include: "non-payment of dividends, insolvency of the debtor corporation, siphoning of funds by the dominant shareholder, non-function of other officers or directors, [and] absence of corporate records." *Id.* at 458, 329 S.E.2d at 332. These are, however, "merely factors to be considered to determine whether sufficient control and domination is present to satisfy the first prong of the three-pronged [instrumentality rule]." *Id.* No one factor is dispositive. *See id.* Instead, our Supreme Court has instructed us to focus on the "reality" of the situation and determine if "an element of injustice or abuse of corporate privilege" exists such that the corporate entity was used as a "mere instrumentality or tool." *See id.* (citation omitted).

**TIMBER INTEGRATED INVS., LLC v. WELCH**

[225 N.C. App. 641 (2013)]

After a thorough review of the evidence in the record at the time of the 2010 summary judgment hearing, especially the depositions of Welch, Joan, and Ron, we conclude that there is a genuine issue of material fact as to the nature of Balsam and its relationship to Welch, Joan, and Ron. Welch's testimony, in particular, suggests that Balsam may have been dominated entirely by Welch or Welch and Ron. Though the extent to which Balsam was capitalized is unclear, Welch's testimony suggests that the organization adhered to few, if any, corporate formalities. This fact, coupled with Welch's testimony that Balsam had failed to pay any taxes and had not participated in any other business transactions, suggests that there is a genuine issue regarding Balsam's true corporate identity. In addition, though Ron denies any involvement in Balsam, the testimony of Welch and Joan suggests that he was a dominant player, if not the decisive figure. Welch's statements that he needed to confer with Ron about Harold's request to "undo" the contract, coupled with his further representation that Joan, Ron, and he were involved in the creation of the company's operation agreement, suggests a genuine issue as to whether Ron was a member of Balsam in "reality." These questions, coupled with the 2012 trial court's condemnation of Balsam, lead us to the conclusion that the ends of justice warrant a deeper examination of these issues.

Therefore, though Defendants contend that there are "no facts which supported the claims against Larry Welch, Joan Mishkin and Ronald Mishkin, personally or the concept that somehow the veil . . . should be pierced," we find that Plaintiffs' depositions contained a sufficient forecast of evidence to establish the existence of a genuine issue of material fact as to Balsam's true corporate identity and Ron's relationship to the company. Therefore, we reverse the 2010 order and remand to the trial court to determine whether each of the individual Defendants, if any, should be held personally liable for Balsam's actions.

Because we have held that there is a genuine issue of material fact on the issue of Balsam's status as a legitimate limited liability company, we need not address Plaintiffs' additional arguments.

REVERSED AND REMANDED.

Judges STEELMAN and McCULLOUGH concur.

## CASES REPORTED WITHOUT PUBLISHED OPINIONS

(FILED 19 FEBRUARY 2013)

FAIRBROTHER v. MANN No. 12-780	Pitt (12CVD74)	Vacated and Remanded
GERRINGER v. PFAFF No. 12-785	Guilford (11CVS5257)	Affirmed
IN RE B.C.V. No. 12-914	Cabarrus (11JT84)	Affirmed
IN RE B.S. No. 12-1164	Buncombe (12JA21)	Affirmed
IN RE F.M. No. 12-1032	Mecklenburg (08JT571-572)	Affirmed
IN RE G.P. No. 12-1070	Cumberland (11JA669)	Affirmed
IN RE J.M.D.R. No. 12-1235	Iredell (10JT31)	Affirmed
IN RE J.N.S. No. 12-1021	Guilford (03JT788) (09JT675-677)	Affirmed
IN RE L.H.T. No. 12-1073	Brunswick (11JT143)	Affirmed
IN RE S.A.C. No. 12-989	New Hanover (10JT226)	Affirmed
IN RE S.S. No. 12-1112	Bladen (11JA4-6)	Affirmed in case Nos. 11 JA 04 and 05; affirmed in part and reversed in part in case No. 11 JA 06.
JORDANS CONSTR., INC. v. FOREST SPRINGS, LLC No. 12-904	Wake (09CVS4638)	Affirmed
JUDSON v. WEISS No. 12-403	Mecklenburg (11CVD20257)	Affirmed



MAHBUBA v. WASHINGTON No. 12-949	Forsyth (11CVD7710)	Dismissed
STATE v. FRANKLIN No. 12-851	Person (11CRS1783)	No Error
STATE v. HORTON No. 12-366	Gaston (10CRS19050-53)	No Error
STATE v. HOWARD No. 12-687	Mecklenburg (08CRS235824) (08CRS74704)	No Error
STATE v. LAMBERT No. 11-1574-2	Mecklenburg (07CRS245994-95)	Affirmed
STATE v. LUCAS No. 12-710	Warren (11CRS50495)	No Error
STATE v. MARTIN No. 12-795	Mecklenburg (11CRS211729) (11CRS211730)	No Error
STATE v. PARKER No. 12-836	Guilford (09CRS101950-52) (09CRS93829) (10CRS23149)	No Error
STATE v. SHEPPARD No. 12-737	Forsyth (11CRS57909)	Affirmed
STATE v. TAFT No. 12-646	Martin (09CRS50910) (09CRS50912) (09CRS50913) (09CRS50915) (10CRS73)	No Error
STATE v. WILLIAMS No. 12-753	Cumberland (09CRS62941)	No Error
STEPP v. AWAKENING HEART, PA No. 12-581	Henderson (08CVS2135)	Affirmed

**CARLE v. WYRICK, ROBBINS, YATES & PONTON, LLP**

[225 N.C. App. 656 (2013)]

SCOTT B. CARLE AND JOHN SIMMONS, PLAINTIFFS

v.

WYRICK, ROBBINS, YATES & PONTON, LLP, AND MADISON E. BULLARD, JR.,  
DEFENDANTS

No. COA12-1093

Filed 5 March 2013

**Statutes of Limitation and Repose—professional negligence—  
claim barred**

Plaintiffs' legal malpractice claim was barred by the statute of repose where plaintiffs commenced their action more than four years after the last act of defendants giving rise to plaintiff's cause of action.

Appeal by plaintiffs from order entered 28 June 2012 by Judge Edwin G. Wilson, Jr., in Superior Court, Wake County. Heard in the Court of Appeals 14 February 2013.

*Higgins Benjamin, PLLC, by Robert G. McIver, for plaintiffs-appellants.*

*Patterson Dilthey, LLP, by Ronald C. Dilthey, for defendants-appellees.*

STROUD, Judge.

Scott Carle and John Simmons ("plaintiffs") filed a complaint against the law firm of Wyrick, Robbins, Yates, and Ponton, LLP, and attorney Madison Bullard, Jr. ("defendants") on 25 January 2010 alleging professional negligence, breach of fiduciary duty, negligent or intentional misrepresentation, constructive fraud, and breach of contract. Plaintiffs appeal from an order entered 28 June 2012 in Superior Court, Wake County, granting defendants' motion for summary judgment.

**I. Background**

Plaintiffs were joint owners of East Coast Drilling and Blasting, Inc. ("East Coast"). In 2004, they decided to create an employee stock ownership trust ("ESOP Trust") and to "monetize" their stock in East Coast. To do so, they enlisted the help of a variety of advisors, including a CPA and a separate financial adviser to coordinate the transaction. Plaintiffs retained defendants to represent their personal interests in the transaction. Other firms were retained to represent plaintiffs' corporation and the ESOP trustee. On the advice of defendants, plaintiffs

**CARLE v. WYRICK, ROBBINS, YATES & PONTON, LLP**

[225 N.C. App. 656 (2013)]

later retained the firm of Holland and Knight to provide an opinion letter on the tax implications of the transaction.

The transaction was supposed to be structured so that plaintiffs would be able to “monetize” their corporate stock while avoiding the capital gains taxes normally associated with doing so. The transaction consisted of three parts: (1) the sale and transfer of the East Coast stock to the ESOP trust, (2) a one-day loan of \$8,000,000 to East Coast to finance the transfer, and (3) the monetization of the sale price to defer the taxes payable on the sale through the purchase of qualified replacement securities (“QRS”).

Plaintiff Carle sold 9,000 shares of his East Coast stock to the ESOP Trust in exchange for \$9,022,410, consisting of \$1,822,410 in cash and a promissory note worth \$7,200,000 from East Coast. Plaintiff Simmons sold 1,000 shares of his stock to the ESOP Trust for \$1,002,490, consisting of \$202,500 in cash and a promissory note worth \$799,990 from East Coast. In order to avoid capital gains taxes, plaintiffs had to reinvest the face dollar amount of the sale price in QRS within 12 months of the closing date of the sale. If plaintiffs held the QRS until death they may have been able to avoid capital gains taxes on the transaction under section 1042 of the Internal Revenue Code.

To acquire the necessary QRS, plaintiffs contracted with Optech Ltd., which was controlled by Derivium Capital, LLC, to provide a loan for 90% of the value of the QRS, with the QRS pledged as collateral. Around \$9,000,000 in QRS were to be purchased by Optech with approximately \$1,000,000 that plaintiffs deposited with the Lehman Brothers financial services firm and the approximately \$8,000,000 loan from Optech. Plaintiffs have alleged that Optech did not actually hold the QRS, but “churned” their account by selling the QRS it was supposed to hold as collateral through Morgan Keegan, its broker-dealer, then reinvesting 90% of the proceeds in plaintiffs’ Lehman account to make it appear that the amount of QRS was growing, and repeating the process, while charging plaintiffs fees and commissions at each step.

Plaintiffs received a notice from the Internal Revenue Service (IRS) on or about 9 October 2007 informing them that the QRS would not in fact be exempt from the capital gains tax because the securities had actually been sold. In 2010, plaintiffs accepted a closing agreement with the IRS to resolve their outstanding tax issues. Plaintiff Carle was assessed a tax deficiency of \$1,414,413 for tax year 2005 and \$180,334 for tax year 2006. Plaintiff Simmons was assessed

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a deficiency of \$155,020 for tax year 2005 and \$22,926 for tax year 2006. Plaintiffs were also assessed fees and penalties.

## II. Procedural History

Plaintiffs separately commenced actions on 17 July 2009 by issuance of a summons along with an application for extending time to file the complaint under N.C. Gen. Stat. § 1A-1, Rule 3(a).<sup>1</sup> The initial order extending time to file the complaint only allowed plaintiffs an additional 10 days, although the application requested 20 additional days, as provided by Rule 3. On 6 August 2009, Plaintiffs then filed a motion under N.C. Gen. Stat. § 1A-1, Rule 60(b) for relief from the initial order providing only ten days on the basis of mistake and excusable neglect. Plaintiffs simultaneously filed their complaint and amended applications to allow the filing of the complaint on or before 6 August 2009, as plaintiffs could have done if the initial order were drafted correctly. An assistant clerk of Superior Court signed the application and order on or about 6 August 2009. The Superior Court, however, denied plaintiffs' Rule 60(b) motion by order entered on or about 25 January 2010; plaintiffs did not file notice of appeal from that order. Plaintiffs then voluntarily dismissed the consolidated complaint on 25 January 2010 and jointly re-filed the present complaint that same day.

On appeal, plaintiffs make no argument that the 2010 complaint relates back to the 17 July 2009 summons, nor did they appeal from the trial court's order denying their Rule 60 motion in the 2009 action. They state that the action was commenced "by the filing of a complaint and issuance of Summonses on 25 January 2010." Therefore, we will consider 25 January 2010 the date that plaintiffs commenced the present action.

The Superior Court, Wake County, dismissed all of plaintiffs' claims other than professional negligence, but denied defendants' motion to dismiss as to that claim by order entered 1 November 2010. After the parties took depositions and conducted discovery, defendants moved for summary judgment on the professional negligence claim. The trial court granted defendant's motion for summary judgment by order entered 28 June 2012. Plaintiffs filed written notice of appeal to this Court from the 28 June order on 6 July 2012.

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1. Plaintiffs also filed arbitration claims with the Financial Industry Regulatory Authority against their financial advisers, Lehman Brothers, Morgan Keegan, and others concerning this same transaction.

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## III. Summary Judgment

Plaintiffs argue on appeal that the trial court erred in granting defendants' motion for summary judgment. They contend that their complaint is not barred by the applicable statute of limitations because their cause of action did not accrue until the IRS proceedings were completed on or about 26 May 2010. They further argue that there is a genuine issue of material fact as to defendants' role in the transaction, especially whether defendants had agreed to vet the cross-parties and analyze the feasibility of the Optech proposal, and whether defendants actually provided tax advice despite the provision of the engagement letter explicitly excluding such advice from the scope of representation. For the following reasons, we hold that plaintiffs' claim is barred by the statute of repose under N.C. Gen. Stat. § 1-15(c) and affirm the trial court's order. Therefore, we do not reach plaintiffs' second argument.

## A. Standard of Review

On appeal from summary judgment, the applicable standard of review is whether there is any genuine issue of material fact and whether the moving party is entitled to a judgment as a matter of law. Summary judgment is appropriate if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to judgment as a matter of law. If there is any evidence of a genuine issue of material fact, a motion for summary judgment should be denied. We review the record in a light most favorable to the party against whom the order has been entered to determine whether there exists a genuine issue as to any material fact.

*Smith v. Harris*, 181 N.C. App. 585, 587, 640 S.E.2d 436, 438 (2007) (citations, quotation marks, and brackets omitted).

## B. Statute of Limitations and Statute of Repose

Plaintiffs' only claim is one of legal malpractice. The statutes of limitations and repose for professional malpractice claims, including legal malpractice claims, are set out in N.C. Gen. Stat. § 1-15(c):

Except where otherwise provided by statute, a cause of action for malpractice arising out of the performance of or failure to perform professional services shall be

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deemed to accrue at the time of the occurrence of the last act of the defendant giving rise to the cause of action: Provided that whenever there is bodily injury to the person, economic or monetary loss, or a defect in or damage to property which originates under circumstances making the injury, loss, defect or damage not readily apparent to the claimant at the time of its origin, and the injury, loss, defect or damage is discovered or should reasonably be discovered by the claimant two or more years after the occurrence of the last act of the defendant giving rise to the cause of action, suit must be commenced within one year from the date discovery is made: Provided nothing herein shall be construed to reduce the statute of limitation in any such case below three years. Provided further, that in no event shall an action be commenced more than four years from the last act of the defendant giving rise to the cause of action[.]

N.C. Gen. Stat. § 1-15(c) (2009).

“This statute creates, among other things, a statute of repose which is not measured from the date of injury, but [from] the date of the last act of the defendant giving rise to the cause of action or from substantial completion of some service rendered by defendant.” *Garrett v. Winfree*, 120 N.C. App. 689, 693, 463 S.E.2d 411, 414 (1995) (citation and quotation marks omitted); see *State ex rel. Long v. Petree Stockton, L.L.P.*, 129 N.C. App. 432, 443-44, 499 S.E.2d 790, 797-98 (measuring statute of repose from the last allegedly negligent acts as pled in the plaintiff’s complaint), *disc. rev. granted in part, dismissed in part*, 558 S.E.2d 190 (N.C. 1998), *disc. rev. dismissed as improvidently granted*, 350 N.C. 57, 510 S.E.2d 374 (1999).

“Regardless of when plaintiffs’ claim might have accrued, or when plaintiffs might have discovered their injury, because of the four-year statute of repose, their claim is not maintainable unless it was brought within four years of the last act of defendant giving rise to the claim.” *Hargett v. Holland*, 337 N.C. 651, 655, 447 S.E.2d 784, 788 (1994) (citations omitted). Continued representation after the last act giving rise to the claim does not toll or extend the statute of repose. See *Chase Development Group v. Fisher, Clinard & Cornwell, PLLC*, \_\_\_ N.C. App. \_\_\_, \_\_\_, 710 S.E.2d 218, 225 (2011) (“Continuing representation of a client by an attorney following the last act of negligence does not extend the statute of limitations.”); *Teague v. Isenhower*, 157 N.C. App. 333, 338, 579 S.E.2d 600, 604 (measuring the

## CARLE v. WYRICK, ROBBINS, YATES &amp; PONTON, LLP

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statute of limitations from the last allegedly negligent acts at trial, not the later appellate representation as to which there were no allegations of negligence), *disc. rev. denied*, 357 N.C. 470, 587 S.E.2d 347 (2003). “If the action is not brought within the specified period, the plaintiff literally has no cause of action. The harm that has been done is *damnum absque injuria*—a wrong for which the law affords no redress.” *Goodman v. Holmes & McLaurin Attorneys at Law*, 192 N.C. App. 467, 474, 665 S.E.2d 526, 531 (2008) (citation and quotation marks omitted).

Plaintiffs argue that their claim is not barred because this Court held in *Snipes v. Jackson*, 69 N.C. App. 64, 316 S.E.2d 657, *disc. rev. denied*, 312 N.C. 85, 321 S.E.2d 899 (1984), that a malpractice action against an accountant and a tax attorney did not accrue until the IRS assessed a tax deficiency against the plaintiff. *Snipes* differs from the present case in one important respect. *Snipes* only addressed the statute of limitations, not the statute of repose, and only addressed when the plaintiff’s action accrued. *See id.* at 71, 316 S.E.2d at 661. This distinction is vital in the present case. Unlike the statute of limitations, the statute of “repose serves as an unyielding and absolute barrier that prevents a plaintiff’s right of action even before his cause of action may accrue, which is generally recognized as the point in time when the elements necessary for a legal wrong coalesce.” *Hargett*, 337 N.C. at 655, 447 S.E.2d at 788 (citation and quotation marks omitted).<sup>2</sup>

In order to decide whether the statute of repose bars plaintiffs’ claim we must determine when the last act of alleged negligence took place. *Garrett*, 120 N.C. App. at 693, 463 S.E.2d at 414. To determine when the last act or omission occurred we look to factors such as the contractual relationship between the parties, when the contracted-for services were complete, and when the alleged mistakes could no longer be remedied. *See, e.g., Babb v. Hoskins*, \_\_\_ N.C. App. \_\_\_,

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2. We note that if plaintiffs were correct that their action accrued in May 2010, their complaint filed in January 2010 would have been premature and subject to dismissal because “[t]here cannot be an action or proceeding, as those terms are used in Chapter 1 of the General Statutes, until a cause of action accrues.” *Ocean Hill Joint Venture v. North Carolina Dept. of Environment, Health and Natural Resources*, 333 N.C. 318, 323, 426 S.E.2d 274, 277 (1993); *see Harshaw v. Mustafa*, 321 N.C. 288, 290, 362 S.E.2d 541, 542 (1987) (holding that the trial court should have granted the defendants’ motion to dismiss because the complaint had been filed before the cause of action accrued); N.C. Gen. Stat. § 1-15(a) (2009) (“Civil actions can only be commenced within the periods prescribed in this Chapter, *after the cause of action has accrued*, except where in special cases a different limitation is prescribed by statute.” (emphasis added)).

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\_\_\_\_, 733 S.E.2d 881, 885 (2012) (holding that the last act of the defendant attorney was the drafting of the trust documents because that was the service the defendant had agreed to provide), *Garrett*, 120 N.C. App. at 693-96, 463 S.E.2d at 414-16 (holding that, assuming the defendant attorney had a continuing obligation under the contract to correct a negligent omission, the “last act” was the point at which the defendant attorney could no longer remedy the alleged omission), *Hargett*, 337 N.C. at 656-58, 447 S.E.2d at 788-89 (holding that “[b]ecause of the contractual arrangement between testator and defendant here, defendant’s professional obligations concluded with his preparation of the will and the supervision of its execution, the latter act becoming his last act giving rise to the claim.”), and *McGahren v. Saenger*, 118 N.C. App. 649, 653, 456 S.E.2d 852, 854 (holding that where the defendant attorney contracted to draft a deed the defendant attorney’s last act was delivering the deed), *disc. rev. denied*, 340 N.C. 568, 460 S.E.2d 318 (1995).

Plaintiffs alleged that defendants

breached their duty to Carle and Simmons by:

- a) Communicating inaccurate, incomplete and erroneous information to Carle and Simmons regarding the Optech monetization loan program.
- b) Failing to adequately conduct their due diligence investigation of Derivium and its affiliate, Optech, and the individuals involved in the reinvestment transaction.
- c) Failing to verify that the stocks purchased as QR[S] were, in fact, in existence when Carle and Simmons made their Section 1042 election and held in ‘accounts located with a nationally or internationally recognized financial institution . . . on behalf of the borrower’ as required by the Master Loan Financing and Security Agreement.
- d) Failing to discover that Derivium and Optech appeared to be operating a Ponzi scheme.
- e) Failing to discover that Derivium and Optech were under investigation by the California Franchise Tax Board and the Internal Revenue Service, and that both tax authorities had characterized these transactions as sales rather than loans.



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- f) Failing to make reasonable inquiries necessary to adequately perform a due diligence investigation of Derivium and Optech.
- g) Failing to meet the standards of reasonable care required of lawyers in the same or similar localities and under similar circumstances.

Defendants deny that they ever agreed to provide a due diligence investigation of Derivium and Optech, provide any tax advice, or opine on the financial viability of the proposed transaction. They highlight that the Engagement Letter signed by plaintiffs and defendants specifically excludes tax advice, advice on how to properly assess whether the proposed purchases were qualified replacement securities, and advice on the financial feasibility of the overall transaction. Although he admits signing it, plaintiff Carle claims to have never read the agreement and testified that “what the engagement letter said and what happened in reality were two different things. We [received] plenty of tax advice from [defendants].”

Although there is a genuine issue of fact regarding the actual scope of defendant’s legal services, there is no debate that the period during which defendants allegedly failed to provide proper advice or conduct a thorough investigation of the other parties to the deal was prior to the deal closing. “[A]n attorney’s duty to a client is . . . determined by the nature of the services he agreed to perform.” *Hargett*, 337 N.C. at 656, 447 S.E.2d at 788. Defendants were engaged to represent plaintiffs during the ESOP transaction. The Engagement Letter specified the three stages of the transaction:

Our representation will address three main components of the total transaction. One is the sale and transfer of stock indicated earlier (the “Sale”). Another is your loan of approximately \$8,000,000 to the Company simultaneously with the Sale, the Company’s other borrowings as they affect your loan and issuance to you of any stock warrants incident to your loan (the “Loan”). The third component includes transactions whereby you obtain qualified replacement securities following the Sale and simultaneously obtain one or more loans secured by a pledge of those securities (the “Monitization Transactions”).

In August 2005, after the deal had closed, concerns were raised regarding the transaction because Derivium was on the brink of bank-

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ruptcy, which defendants then investigated at plaintiffs' request. Defendants later helped prepare for plaintiffs' 2007 IRS inquiry relating to the tax implications of this transaction. Thus, it is clear that although they considered these matter separate and billed plaintiffs for each matters separately, defendants continued to represent plaintiffs well after 10 June 2005 and to assist plaintiffs with matters arising from the transaction, even without any subsequent engagement letter.

Plaintiffs correctly point out that defendants cannot simply divide the representation into different files to separate these matters for purposes of the statute of repose. The issue, however, is not whether defendants continued to represent plaintiffs after the transaction, *Chase Development Group*, \_\_\_ N.C. App. at \_\_\_, 710 S.E.2d at 225, nor whether defendants divided their representation in a certain way for billing purposes. The issue is when the last act alleged to have caused plaintiffs harm occurred. *Garrett*, 120 N.C. App. at 693, 463 S.E.2d at 414.

All of plaintiffs' claims arise from the conduct of this transaction, not from any subsequent conduct. The last action that defendants took on this transaction was a final set of emails on 27 May and 10 June 2005 between defendant Bullard and Randolph Anderson of Derivium wherein defendant Bullard inquired about the status of the securities purchases and Mr. Anderson responded that the transaction was complete. Defendant Bullard testified that their work on the transaction stopped at that time because "there was nothing else to do." On 18 July 2005, defendants sent a letter to plaintiffs informing them that Derivium had confirmed that the transaction had been completed.

Additionally, by 10 June 2005, nothing could have been done to change the fact that the money had been transferred to Derivium/Optech or to remedy the tax implications of the transaction. See *Garrett*, 120 N.C. App. at 694-95, 463 S.E.2d at 415 (holding that any continuing duty the defendant attorney may have had was finished when the alleged mistake could no longer be remedied). According to plaintiffs' expert witness, the tax penalties for which plaintiffs seek compensation were unavoidable after 1 January 2005 because at that point it would not have been possible to "do a valid tax rescission." Further, according to the expert, after spring 2005 the money invested by plaintiffs could not be recovered because once Derivium had the money, "it was gone." Thus, after that point there would have been no opportunity to remedy any failure to fully vet

**CARLE v. WYRICK, ROBBINS, YATES & PONTON, LLP**

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Derivium and Optech, or properly analyze the tax implications of the transaction.

Considering the evidence in the light most favorable to plaintiffs, the last act giving rise to plaintiffs' claim took place on 10 June 2005 because at that point defendants' role in the transaction was complete and nothing could have been done to remedy the alleged omissions. *See Garrett*, 120 N.C. App. at 693, 463 S.E.2d at 414. Plaintiffs commenced this action on 25 January 2010, more than four years after the last act of defendants giving rise to plaintiff's cause of action. Even if plaintiffs are correct that their action did not accrue until the IRS issued its final assessment, the action would still be barred by the statute of repose. N.C. Gen. Stat. § 1-15(c); *Hargett*, 337 N.C. at 655, 447 S.E.2d at 788. "If the action is not brought within the specified period, the plaintiff literally has no cause of action." *Goodman*, 192 N.C. App. at 474, 665 S.E.2d at 531. Therefore, defendants are entitled to judgment as a matter of law and we affirm the trial court's order granting defendants' motion for summary judgment. *See Smith*, 181 N.C. App. at 587, 640 S.E.2d at 438.

#### IV. Conclusion

Plaintiffs' only claim against defendants is barred by the statute of repose in N.C. Gen. Stat. § 1-15(c) because plaintiffs commenced the present action more than four years after the last act giving rise to their claim. There is no genuine issue as to facts material to the applicability of the statute of repose and defendants are entitled to judgment as a matter of law. Therefore, we affirm the trial court's order granting defendants' motion for summary judgment.

**AFFIRMED.**

Judges STEPHENS and DILLON concur.

**CHARLES SCHWAB & CO. v. McENTEE**

[225 N.C. App. 666 (2013)]

CHARLES SCHWAB &amp; COMPANY, INC, PLAINTIFF

v.

JOHN MCENTEE, PERSONAL REPRESENTATIVE OF THE ESTATE OF ALAN J. MCENTEE  
AND KELLY MCENTEE, A/K/A KELLY PECHA, DEFENDANTS

No. COA12-897

Filed 5 March 2013

**1. Appeal and Error—jurisdiction on appeal—settlement agreement**

An appeal from the denial of a motion to intervene in an interpleader action to determine the rightful beneficiary to an individual retirement account was properly before the Court of Appeals where the Estate contended that the Association's notice of appeal was filed after the named parties filed a stipulation of dismissal. The settlement was approved on the same day the motion to intervene was denied and was a final judgment as to the named parties, so that the later stipulation of dismissal had no bearing on the Association's right to appeal.

**2. Civil Procedure—intervention—estate—adequate representation by personal representative**

In an interpleader action to determine the rightful beneficiary of an individual retirement account, the American Diabetes Association's motion for intervention as of right was properly denied. The Association failed to satisfy the third of the three requirements for intervention: that its interests were not adequately represented by the personal representative in the interpleader action.

**3. Civil Procedure—permissive intervention—denied**

There was no abuse of discretion in the denial of permissive intervention by the American Diabetes Association in an interpleader action to determine the rightful beneficiary of an individual retirement account. The trial court could properly conclude that the Association's interest in the interpleader action was adequately represented by the personal representative of the Estate.

Appeal by Defendant from order entered 17 May 2012 by Judge Richard D. Boner in Mecklenburg County Superior Court. Heard in the Court of Appeals 7 January 2013.

**CHARLES SCHWAB & CO. v. McENTEE**

[225 N.C. App. 666 (2013)]

*Essex Richards, PA, by Edward G. Connette and Elizabeth A. Buckner, for Defendant-Appellee John McEntee, as Personal Representative of the Estate of Alan J. McEntee.*

*Norelli Law, PLLC, by Nancy Black Norelli, Esq., and Louis A. Bernard, Esq., Pro Hac Vice, for Intervenor-Appellant American Diabetes Association.*

DILLON, Judge.

The American Diabetes Association appeals from the trial court's order denying its Motion to Intervene in an interpleader action filed by Charles Schwab & Company, Inc. (Schwab) for the purpose of determining the rightful beneficiary of an individual retirement account owned by Alan J. McEntee (the Decedent) and held by Schwab. For the following reasons, we affirm the trial court's order denying intervention.

#### I. Factual & Procedural Background

The Decedent opened IRA #6162-1512 (the IRA) with Schwab on or about 13 April 1993. The Decedent designated his then-girlfriend, Kelly McEntee, a/k/a Kelly Pecha (Kelly), as the sole beneficiary of the IRA at that time. The Decedent and Kelly subsequently married on 5 June 1996.

In June 2004, the Decedent and Kelly separated after approximately eight years of marriage. The parties thereafter entered into a written separation agreement (the Separation Agreement), which set forth the following provisions pertaining to distribution of the IRA:

Schwab IRA Retirement Account #6162-1512. Husband owns a tax-deferred Alan [sic] Schwab IRA retirement account which held approximately one hundred seventy two thousand four hundred and twenty dollars (\$172,420.00) at the date of separation. Wife conveys any and all right, claim or interest she may have in and to Alan [sic] Schwab IRA #6162-1512, to Husband. This account is distributed to Husband and is Husband's separate property.

....

EQUITABLE DISTRIBUTION. The property settlement as provided herein is the act of Husband and Wife in equitably dividing their property as provided under

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N.C.G.S. § 50-20(d). Each releases the other from any further claim which could or might arise in favor of either under N.C.G.S. § 50-20 or any other state or federal law involving division of property acquired during marriage.

....

ESTATE. The parties each waive any right which either may have . . . [t]o assert claims or rights in and to the estate of the other[.]”

....

FINAL SETTLEMENT. It is the intent of the parties that this Agreement constitute a final settlement of all rights and claims arising out of their marriage with regard to alimony and distribution of property. Each party acknowledges and agrees that the settlement herein set forth constitutes an equitable division and distribution of all marital property and each party waives, releases and relinquishes unto the other party, his or her heirs, executors, administrators and assigns, any and all rights and claims to marital or separate property under the provisions of North Carolina General Statutes § 50-20 *et seq.* or any other rule, statute, or law, local, state or federal.

The Decedent and Kelly executed the foregoing Separation Agreement on or about 25 August 2004, and their divorce became final on 21 June 2006.

On 4 September 2008, the Decedent executed two documents: (1) the Alan J. McEntee Family Trust (the Living Trust); and (2) his Last Will and Testament (the Will). In the Will, the Decedent named his brother, John McEntee, to serve as the personal representative thereunder and further named the Living Trust as the primary beneficiary of his estate. The Living Trust names John McEntee and the American Diabetes Association (the Association) as its primary beneficiaries to receive the assets of the Living Trust upon the Decedent's death. However, at no time following the Decedent's divorce from Kelly did the Decedent contact Schwab to remove Kelly as the designated beneficiary of the IRA.

The Decedent died on 4 September 2010. Following the Decedent's death, Kelly contacted Schwab to claim ownership of the

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IRA and the proceeds to be paid therefrom. However, John McEntee, as the personal representative of the Decedent's estate (the Estate), also contacted Schwab and asserted that the proceeds from the IRA should be paid over to the Estate, citing the Separation Agreement as evidence that Kelly had relinquished her right to the proceeds from the IRA. Kelly countered that she and the Decedent had remained friends following their divorce, that the Decedent had consistently expressed his intent to provide for her after his death, and that the Decedent's failure to remove her as the designated beneficiary of the IRA was evidence of this intent.

On 8 December 2011, Schwab filed an Interpleader Complaint in Mecklenburg County Superior Court for the purpose of resolving the parties' competing claims to the IRA. On 3 January 2012, Schwab filed a Motion for Order Authorizing Schwab to Liquidate and Deposit Funds with the Clerk Pursuant to Rule 22, and for Dismissal from the Case (Schwab's Rule 22 Motion). Both Kelly and the Estate filed answers to Schwab's Interpleader Complaint and asserted cross-claims against one another claiming that each was entitled to the funds in question. On 1 February 2012, the trial court issued an order directing the parties to participate in alternative dispute resolution. Subsequently, the hearing on Schwab's Rule 22 Motion was scheduled to be heard on 17 April 2012. Prior to the Rule 22 Motion hearing, however, Kelly and the Estate executed a settlement agreement (the Family Settlement Agreement), which purported to resolve all claims in the action. Under the terms of the Family Settlement Agreement, Kelly would receive \$170,000.00, and the Estate would receive the balance of the proceeds from the IRA.<sup>1</sup>

However, on 16 April 2012, the day prior to the hearing on Schwab's Rule 22 Motion, the Association submitted a Motion to Intervene in the action pursuant to Rule 24 of the North Carolina Rules of Civil Procedure. The Association claimed a right to intervene in the action based upon its status as a primary beneficiary under the Decedent's Living Trust, which was a primary beneficiary under the Decedent's Will. The Association asserted that "[t]he [IRA] funds in question should properly flow to the Estate of [the Decedent] and then to said Living Trust of which [the Association] is a beneficiary." The Association further asserted that it had not been served with a copy of Schwab's Interpleader Complaint; that it had no knowledge of

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1. Although the appellate record is silent as to the precise amount distributed to the Estate under the Family Settlement Agreement, the Estate represents in its appellee brief that it received approximately \$161,240.87.

the interpleader action until on or about 30 March 2012; that the parties had requested the Association's participation in the Family Settlement Agreement on or about 30 March 2012; that the Association's participation in the Family Settlement Agreement would render its interest in the IRA "substantially less than that to which it [was] entitled"; and that it believed that "the parties in this action [were] contemplating a compromise settlement which would lead to dismissal of the action with the [Association] having no opportunity to be heard and with the funds being distributed to the current parties rather than being retained with Schwab pending a judicial determination of the rights of the [Association] or the parties."

The following day, on 17 April 2012, Schwab's Rule 22 Motion came on for hearing in Mecklenburg County Superior Court. When the case was called, the parties to the interpleader action—Schwab, Kelly and the Estate (collectively, the Named Parties)—informed the court that an agreement had been reached with respect to the IRA and submitted the Family Settlement Agreement for the court's approval. The Association's Motion to Intervene, to which both Kelly and the Estate objected,<sup>2</sup> was also brought to the court's attention. After hearing arguments from both sides, the trial court orally denied the Association's Motion to Intervene.

Further, by written order entered 17 April 2012, the trial court approved the Family Settlement Agreement and ordered distribution of the proceeds from the IRA pursuant thereto, concluding that the Family Settlement Agreement was "reasonable" and "result[ed] in a full resolution of all matters in controversy in [the] action." Although the trial court orally denied the Association's motion to intervene in open court on 17 April 2012, a written order denying the motion was not entered until 17 May 2012. The Association filed its notice of appeal from the trial court's 17 May 2012 order that same day. In the interim, on 14 May 2012, the Named Parties filed a stipulation of dismissal, dismissing with prejudice all claims and crossclaims asserted in the interpleader action.

## II. Jurisdiction

[1] At the outset, we address the Estate's contention that this appeal is not properly before us. The Estate contends that this Court lacks jurisdiction over this matter because the Named Parties filed a stipu-

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2. The Estate served Schwab, Kelly, and the Association with its Response and Memorandum in Opposition to the Association's Motion to Intervene on 17 April 2012.



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lation of dismissal with prejudice as to the interpleader action on 14 May 2012, while the Association did not file its notice of appeal from the trial court's order denying intervention until 17 May 2012.

Rule 41(a) of the North Carolina Rules of Civil Procedure permits a plaintiff to voluntarily dismiss an action "by filing a stipulation of dismissal signed by all parties who have appeared in the action." N.C. Gen. Stat. § 1A-1, Rule 41(a)(1)(ii) (2011). This Court has held, however, that " 'a voluntary dismissal under Rule 41 will lie only prior to entry of *final judgment*[,]' " and that a dismissal after a final judgment has been entered is "of 'no legal efficacy[.]' " *Massey v. Massey*, 121 N.C. App. 263, 268, 465 S.E.2d 313, 316 (1996) (citation omitted). "A final judgment is one which disposes of the cause as to all the parties, leaving nothing to be judicially determined between them in the trial court." *Veazey v. City of Durham*, 231 N.C. 357, 361-62, 57 S.E.2d 377, 381 (1950).

Here, the trial court's 17 April 2012 order was a "final judgment" with respect to the Named Parties in that it left "nothing to be judicially determined" among them. Indeed, the trial court characterized its order as such in noting that the Family Settlement Agreement represented "a full resolution of all matters in controversy in this action." The Named Parties' subsequent 14 May 2012 stipulation of dismissal thus had no bearing on the Association's right to appeal from the trial court's denial of its Motion to Intervene, which, although ruled upon in open court at the 17 April 2012 hearing, was not entered, i.e., reduced to writing and filed, until 17 May 2012. To hold otherwise would deprive the Association of an appeal from the trial court's ruling on intervention, as the 30-day window for noticing an appeal from that ruling did not begin to run until the written order was entered on 17 May 2012. *See Mastin v. Griffith*, 133 N.C. App. 345, 346, 515 S.E.2d 494, 495 (1999) (holding that "an order may not properly be appealed until it is entered"); N.C. R. App. P. 3(c)(1) (2013) (providing that an appeal must be taken "within thirty days *after entry of judgment*" (emphasis added)); *Abels v. Renfro Corp.*, 126 N.C. App. 800, 803, 486 S.E.2d 735, 737 (1997) (holding that an "[a]nnouncement of judgment in open court merely constitutes 'rendering' of judgment, not entry of judgment"); N.C. Gen. Stat. § 1A-1, Rule 58 (2011) (providing that "a judgment is entered when it is reduced to writing, signed by the judge, and filed with the clerk of court"). This argument is accordingly overruled, and we proceed to address the merits of the Association's appeal.

## III. Analysis

The Association contends (1) that the trial court erred in denying its motion to intervene as of right pursuant to Rule 24(a)(2) of the North Carolina Rules of Civil Procedure; (2) that the trial court erred in denying the Association's request for permissive intervention pursuant to Rule 24(b) of the North Carolina Rules of Civil Procedure; and (3) that the Family Settlement Agreement must be set aside due to the trial court's error in failing to join the Association as a party to the interpleader action. We address these contentions in turn.

## A. Intervention as of Right

**[2]** The Association first contends that the trial court erred in denying its motion to intervene as of right. Intervention as of right is governed by N.C. Gen. Stat. § 1A-1, Rule 24(a), which provides as follows:

Upon timely application anyone shall be permitted to intervene in an action:

(1) When a statute confers an unconditional right to intervene; or

(2) When the applicant claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

N.C. Gen. Stat. § 1A-1, Rule 24(a) (2011).

The Association does not advance a statutory basis for intervention; rather, the Association contends that Rule 24(a)(2) provides a non-statutory basis for intervention in the present case. This Court has previously stated that Rule 24(a)(2) provides a right to intervene "where (1) the movant has an interest relating to the property or transaction; (2) denying intervention would result in a practical impairment of the protection of that interest; and (3) there is inadequate representation of that interest by existing parties." *Alford v. Davis*, 131 N.C. App. 214, 218, 505 S.E.2d 917, 920 (1998). The movant bears the burden of demonstrating that these three requirements have been met. *Virmani v. Presbyterian Health Servs. Corp.*, 350 N.C. 449, 459, 515 S.E.2d 675, 683 (1999). We review *de novo* the trial court's decision denying intervention under Rule 24(a)(2). *Bailey & Assocs., Inc. v. Wilmington Bd. of Adjustment*, 202 N.C. App. 177, 185, 689 S.E.2d 576, 583 (2010).

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We conclude that the Association has failed to satisfy the third of the three requirements for intervention—namely, that its interests were not adequately represented by the personal representative in the interpleader action—and, accordingly, that the Association’s motion for intervention as of right was properly denied. At the outset, we note that in the Will, Decedent expressly granted to his personal representative “all powers conferred on personal representatives and executors under Chapter 28A and Chapter 32 of the North Carolina General Statutes . . . to compromise and release claims with or without consideration.” Chapter 28A of our General Statutes provides as follows:

(a) Upon the death of any person, all demands whatsoever, and rights to prosecute or defend any action or special proceeding, existing in favor of or against such person, except as provided in subsection (b) hereof, shall survive to and against the personal representative or collector of the person’s estate.

N.C. Gen. Stat. § 28A-18-1(a) (2011). Additionally, Chapter 28A confers the following powers upon the personal representative in prosecuting or defending an action on behalf of the decedent’s estate:

(a) Except as qualified by express limitations imposed in a will of the decedent or a court order, and subject to the provisions of G.S. 28A-13-6 respecting the powers of joint personal representatives, a personal representative has the power to perform in a reasonable and prudent manner every act which a reasonable and prudent person would perform incident to the collection, preservation, liquidation or distribution of a decedent’s estate so as to accomplish the desired result of settling and distributing the decedent’s estate in a safe, orderly, accurate and expeditious manner as provided by law, including the powers specified in the following subdivisions:

. . . .

(15) To compromise, adjust, arbitrate, sue on or defend, abandon, or otherwise deal with and *settle claims* in favor of or against the estate.

N.C. Gen. Stat. § 28A-13-3(a)(15) (2011) (emphasis added); *see also* James B. McLaughlin, Jr., & Richard T. Bowser, *Wiggins Wills and Administration of Estates in North Carolina*, § 20:8 (4th ed.) (2005)

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(“It is the duty of the personal representative to sue and defend suits on behalf of the estate, and such suits can be brought without joining the person or persons for whose benefit the action is prosecuted. The personal representative represents the beneficiaries . . . .”). Our General Statutes further provide that when a personal representative exercises these powers, he does so as a fiduciary:

A personal representative is a fiduciary who, in addition to the specific duties stated in this Chapter, is under a general duty to settle the estate of the personal representative’s decedent *as expeditiously and with as little sacrifice of value as is reasonable under all of the circumstances*. A personal representative shall use the authority and powers conferred upon the personal representative by this Chapter, by the terms of the will under which the personal representative is acting, by any order of court in proceedings to which the personal representative is party, and by the rules generally applicable to fiduciaries, for the best interests of all persons interested in the estate, and with due regard for their respective rights.

N.C. Gen. Stat. § 28A-13-2 (2011) (emphasis added).

The foregoing statutory provisions reflect our General Assembly’s intent to promote orderly and efficient administration of the estate through the estate’s personal representative, who essentially functions as a proxy for all persons interested in the estate, including each of the estate’s beneficiaries.

In the instant case, the Association has not alleged facts which would indicate that its interest was not adequately represented by the personal representative, John McEntee. In his response to the Association’s Motion to Intervene, John McEntee asserted that “[i]f this claim were litigated and lost, and if the litigation costs were paid from limited estate assets, there may be insufficient assets to settle creditors’ claims.” *See Farm Credit Bureau of Columbia v. Edwards*, 121 N.C. App. 72, 76, 464 S.E.2d 305, 307 (1995) (holding that personal representative had the authority to abandon an appeal of a judgment against estate where personal representative determined that the prosecution of the appeal would seriously erode the estate, even if the appeal were successful); *see also Hunter v. Newsom*, 121 N.C. App. 564, 567, 468 S.E.2d 802, 805 (1996) (explaining that a personal representative “[o]rdinarily . . . has the authority, in accomplishing

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the expeditious settlement of a decedent's estate, to settle or compromise claims in favor of or against the estate, provided he acts honestly, reasonably and prudently"). It appears that the Association merely disagrees with the terms of Family Settlement Agreement. We cannot say that this, alone, is sufficient to demonstrate that the Association's interest was not adequately represented in the interpleader action. Because we conclude that the Association has failed to establish one of the three requirements necessary for intervention as of right under Rule 24(a)(2), we need not address the remaining requirements. *See Alford*, 131 N.C. App. at 219, 505 S.E.2d at 921. Accordingly, this contention is overruled.

## B. Permissive Intervention

[3] We further conclude that the trial court did not err in denying the Association's request for permissive intervention. Permissive intervention is governed by Rule 24(b) of the North Carolina Rules of Civil Procedure, which "contains specific requirements which control and limit intervention[.]" *State ex rel. Comm'r. of Ins. v. N.C. Rate Bureau*, 300 N.C. 460, 468, 269 S.E.2d 538, 543 (1980). Pursuant to Rule 24(b), a "third party may be *permitted* to intervene[,] . . . but only '(1) When a statute confers a conditional right to intervene; or (2) When an applicant's claim or defense and the main action have a question of law or fact in common.'" *Virmani*, 350 N.C. at 460, 515 S.E.2d at 683 (quoting N.C. Gen. Stat. § 1A-1, Rule 24(b)). The trial court's ruling on permissive intervention "will not be disturbed on appeal absent an abuse of discretion." *State ex rel. Long v. Interstate Cas. Ins. Comm'n.*, 106 N.C. App. 470, 474, 417 S.E.2d 296, 299 (1992). "An abuse of discretion occurs when the trial court's ruling 'is so arbitrary that it could not have been the result of a reasoned decision.'" *Chicora Country Club, Inc. v. Town of Erwin*, 128 N.C. App. 101, 109, 493 S.E.2d 797, 802 (1997) (citation omitted). "Our trial courts should bear in mind, however, that Rule 24(b)(2) expressly requires that in exercising discretion as to whether to allow permissive intervention, 'the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties.'" *Virmani*, 350 N.C. at 460, 515 S.E.2d at 683 (quoting N.C. Gen. Stat. § 1A-1, Rule 24(b)).

Here, as discussed *supra*, the trial court could properly conclude that the Association's interest in the interpleader action was adequately represented by John McEntee, acting in his capacity as personal representative of the Estate. Permitting intervention under the circumstances might have eradicated the Family Settlement Agree-

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ment and delayed adjudication of the rights of the Named Parties, potentially to the detriment of the creditors and other beneficiaries of the Estate. Thus, we cannot say that the trial court's denial of the Association's Motion to Intervene was "so arbitrary that it could not have been the result of a reasoned decision." *See Virmani*, 350 N.C. at 460, 515 S.E.2d at 683 (holding that the trial court did not abuse its discretion in denying intervention where the court had "every reason . . . to believe that permitting the [applicant] to intervene would . . . unduly delay the adjudication of the rights of the original parties"); *State ex rel. Long*, 106 N.C. at 474, 417 S.E.2d at 299 (holding no abuse of discretion where intervention would have "unduly delay[ed] and prejudice[d] the adjudication of the rights of the original parties"). This argument is overruled.

## IV. Conclusion

Because we have concluded that the trial court did not err in denying the Association's Motion to Intervene, we need not address the Association's contention that the Family Settlement Agreement be set aside. *See Ward v. Taylor*, 68 N.C. App. 74, 80, 314 S.E.2d 814, 820 (1984) ("The general rule is that only a party or his legal representative has standing to have an order set aside, and that a stranger to the action may not obtain such relief.") The trial court's order denying intervention is hereby

AFFIRMED.

Chief Judge MARTIN and Judge ERVIN concur.

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FAIRWAY OUTDOOR ADVERTISING, A DIVISION OF MCC OUTDOOR, LLC  
AND MCC OUTDOOR, LLC, PETITIONERS  
v.  
THE TOWN OF CARY, NORTH CAROLINA AND THE TOWN OF CARY ZONING  
BOARD OF ADJUSTMENT, RESPONDENTS

No. COA12-518

Filed 5 March 2013

**1. Appeal and Error—appealability—untimely appeal—non-conforming outdoor advertising sign**

Petitioner Fairway Outdoor Advertising's (Fairway) appeal in a zoning case of compliance issues with its outdoor advertising

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sign pursuant to the Town of Cary's land development ordinance (LDO) § 10.5.2 was not timely. Fairway did not appeal the contested action regarding its non-conforming sign until almost a year after it had received official notice that it was subject to LDO § 10.5.2. Notice of appeal was required within 30 days pursuant to LDO § 3.21.3(B).

**2. Penalties, Fines, and Forfeitures—civil penalties—non-conforming outdoor advertising sign**

Based on the erroneous conclusion that petitioner Fairway Outdoor Advertising timely appealed the issue of its outdoor advertising sign's compliance with the town's land development ordinance, the zoning case was remanded for the trial court to reconsider the issue of civil penalties.

**3. Zoning—outdoor advertising sign—unlisted use—discretionary decision**

The Planning Director's discretionary decision in a zoning case to not approve petitioner's outdoor advertising sign as an "unlisted use" under LDO § 12.3.1(C)(1) was not error because the Planning Director was not required to do so.

Appeal by respondents from order and judgment entered 28 November 2011 by Judge W. Osmond Smith, III in Wake County, Superior Court. Heard in the Court of Appeals 13 December 2012.

*Wilson & Ratledge, PLLC, by Reginald B. Gillespie, Jr., for petitioners-appellees.*

*The Brough Law Firm, by Michael B. Brough and G. Nicholas Herman, for respondent-appellants.*

STROUD, Judge.

The Town of Cary, North Carolina and the Town of Cary Zoning Board of Adjustment appeal the trial court's 28 November 2011 order and judgment. For the following reasons, we reverse in part and remand in part.

**I. Background**

The trial court briefly summarized the background of this case and its decision in its memorandum of decision:

This matter involves an outdoor advertising sign (the "Sign", its "Sign", or "Fairway's Sign") located at

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844 East Chatham Street, Cary, Wake County, North Carolina. Petitioners Fairway Outdoor Advertising, a division of MCC Outdoor, LLC and MCC Outdoor, LLC (collectively “Fairway”) own the Sign. Fairway sought review and reversal of the ZBOA’s March 26, 2008, “Resolution Deciding Appeals of Fairway Outdoor Advertising” (the “ZBOA’s Decision”) relating to the Sign. Fairway asserts the ZBOA erred in concluding that the continued existence of Fairway’s Sign is a violation of the Town of Cary Land Development Ordinance (the “LDO”), that the Sign must be removed, that Fairway must pay civil penalties for such violation, and that Fairway is not entitled to approval of its Sign as an “Unlisted Use” under the LDO. Respondent Town of Cary, North Carolina (the “Town”) asserts that the foregoing conclusions by the ZBOA were correct, but contends that the ZBOA erroneously concluded that Fairway timely appealed the Town’s determination that Fairway’s Sign is a violation of the LDO and must be removed.

As set forth below, the Court has determined that the ZBOA correctly concluded that Fairway timely appealed from the Town’s determination that Fairway’s Sign is a violation of the LDO and must be removed. Therefore, as to the ZBOA’s conclusion that Fairway’s appeal was timely, the ZBOA’s Decision is affirmed. However, the Court has determined that the ZBOA’s conclusions that Fairway’s Sign is a violation of the LDO and must be removed, that Fairway must pay civil penalties for such violation, and that Fairway is not entitled to approval of its application for an “Unlisted Use” under the LDO are erroneous. With respect to these conclusions, the ZBOA’s Decision is reversed.

The Town of Cary, North Carolina and the Town of Cary Zoning Board of Adjustment (“Cary”) appealed.

## II. Timeliness of Appeal Regarding Sign Compliance

[1] Cary first contends that Fairway’s initial appeal of the Town’s determination that its sign was not in compliance was untimely. “Generally, municipal ordinances and statutes enacted by the legislature are to be construed according to the same rules.” *Clark v. City*



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of *Charlotte*, 66 N.C. App. 437, 439, 311 S.E.2d 71, 72 (1984). Thus, we turn to our law regarding construing statutes. *See id.*

Questions of statutory interpretation are ultimately questions of law for the courts and are reviewed *de novo*.

....

Statutory interpretation begins with the cardinal principle of statutory construction that the intent of the legislature is controlling. In ascertaining the legislative intent, courts should consider the language of the statute, the spirit of the statute, and what it seeks to accomplish. Where the statutory language is clear and unambiguous, the Court does not engage in judicial construction but must apply the statute to give effect to the plain and definite meaning of the language. If the language is ambiguous or unclear, the reviewing court must construe the statute in an attempt not to defeat or impair the object of the statute if that can reasonably be done without doing violence to the legislative language.

*Dayton v. Dayton*, \_\_\_ N.C. App. \_\_\_, \_\_\_, 725 S.E.2d 439, 442 (2012) (citations, quotation marks, ellipses, and brackets omitted). Furthermore, “[o]ur courts have consistently held that statutes dealing with the same subject matter must be construed *in pari materia*, and harmonized, if possible, to give effect to each[.]” *Dougherty Equip. v. M.C. Precast Concrete*, \_\_\_ N.C. App. \_\_\_, \_\_\_, 711 S.E.2d 505, 507 (2011) (citation and quotation marks omitted).

The binding, uncontested facts as found by the trial court state that “[o]n June 23, 2006, one week before expiration of the amortization period, the Town sent Fairway the first official notice that the Town considered Fairway’s Sign to be subject to . . . LDO § 10.5.2.” *See Peters v. Pennington*, \_\_\_ N.C. App. \_\_\_, \_\_\_, 707 S.E.2d 724, 733 (2011) (“Unchallenged findings of fact are binding on appeal.”) In its recitation of the facts the court names LDO § 10.5.2 at least six times as the ordinance at issue between the parties. Despite these findings, when determining whether Fairway made a timely appeal the trial court relies on LDO Chapters 9 and 11, and does not refer to LDO Chapter 10.

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LDO Chapter 9 is entitled “SIGNS[.]” *See* Cary, N.C., Land Development Ordinance ch. 9 (2003).<sup>1</sup> LDO § 9.13 entitled “VIOLATIONS AND ENFORCEMENT[.]” provides that “[v]iolations of this chapter and enforcement procedures are addressed in Chapter 11.” LDO § 9.13. Indeed, LDO Chapter 11 entitled “ENFORCEMENT” has specific provisions regarding “General Appeals of Enforcement Decisions[.]” *See* LDO ch. 11; § 11.2.2. Thus, LDO Chapters 9 and 11 would appear to be potentially applicable to the issue before us. *See* LDO chs. 9, 11.

Nonetheless, the dispute between Fairway and Cary arises not from Chapter 9 but from LDO § 10.5.2 entitled “Nonconforming Pole Signs[.]”<sup>2</sup> *See* LDO § 10.5.2. This is confirmed not only by the uncontested facts, but also by the trial court’s order and judgment which twice determines the merits of this case based upon LDO § 10.5.2 without mention of any other provision on this issue. Neither party has challenged the applicability of LDO § 10.5.2, and this ordinance provides,

Signs or signage which meet the definition of a pole sign (including billboards) in this Ordinance are considered to be nonconforming, and shall be removed or replaced with signage which conforms to the requirements of this Ordinance no later than July 1, 2006. Existing lawfully-placed signs associated with an approved Uniform Sign Plan shall be exempt from this provision. Owners of record for such signs shall be notified of the nonconformity via mailed notice.

LDO § 10.5.2. LDO § 10.5.2 is the basis for the Town’s demand for removal of the sign. But LDO Chapter 10 has no provision regarding appeals from a decision that a pole sign is nonconforming pursuant to LDO § 10.5.2. In fact, LDO Chapter 10 does not contain any appeal provisions.

Because LDO Chapter 10 has no appeal provision, and no direction to handle appeals under LDO Chapter 11, LDO Chapter 11 does not control an issue regarding LDO § 10.5.2. LDO Chapter 9 specifi-

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1. Hereinafter cited as “LDO” and the applicable provision.

2. The trial court also found that “[t]he Town contends that Fairway’s Sign violated LDO § 9.4.1, characterizing Fairway’s sign as a pole sign, off-site sign, and billboard[.]” this statement is a recitation of the Town’s argument and not a finding by the trial court. The trial court did however find that LDO § 10.5.2 is the provision upon which the facts and the Town’s “first official notice” were based.

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cally requires that for issues arising under LDO Chapter 9 appeals must be taken pursuant to LDO Chapter 11. *See* LDO § 9.13. However, because LDO Chapter 10 does not have a specific provision regarding appeals, issues arising under LDO Chapter 10 are governed by the general appeals process provided in LDO Chapter 3. Such an interpretation is the clearest way in which to read LDO Chapters 9 and 10, *in pari materia*, *see Dougherty Equip.*, \_\_\_ N.C. App. at \_\_\_, 711 S.E.2d at 507; Black's Law Dictionary 862 (9th ed. 2009) ("On the same subject; relating to the same matter. It is a canon of construction that statutes that are *in pari materia* may be construed together, so that inconsistencies in one statute may be resolved by looking at another statute on the same subject."), because if the LDO specifically directs that appeals from LDO Chapter 9 must be handled under LDO Chapter 11, and LDO Chapter 10 has no such provision, we must assume that appeals arising from LDO Chapter 10 are controlled by LDO Chapter 3, the general appeal provision. Had the drafters of the LDO intended that LDO Chapter 10 appeals be handled by the LDO Chapter 11 process they logically would have also placed a provision within LDO Chapter 10 directing us to LDO Chapter 11 just as they did in LDO Chapter 9.

Turning to LDO Chapter 3, entitled "REVIEW AND APPROVAL PROCEDURES[.]"

**3.21 APPEALS OF ADMINISTRATIVE DECISIONS****3.21.1 Purpose and Scope**

Appeals to the Zoning Board of Adjustment from the decisions of the Town's administrative staff are allowed under this Ordinance. It is the intention of this Section that all questions arising in connection with the interpretation and enforcement of this Ordinance shall be presented first to the appropriate administrative officer in the Engineering or Planning Department, that such questions shall be presented to the Zoning Board of Adjustment only on appeal from the decisions of that department, and that recourse from the decision of the Zoning Board of Adjustment shall be to the courts. It is further the intention of this Section that the duties of the Town Council in connection with this Ordinance shall not include the hearing or passing upon disputed questions that may arise in connection with the enforcement thereof.

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**3.21.2 Decisions That May Be Appealed**

Any order, requirement, permit, decision, determination, refusal, or interpretation made by any administrative officer in interpreting and/or enforcing the provisions of this Ordinance may be appealed to the Zoning Board of Adjustment, unless otherwise provided in this Ordinance.

**3.21.3 Filing of Appeal; Effect of Filing**

(A) An appeal to the Zoning Board of Adjustment may be brought by any person, firm, corporation, office, department, board, bureau or commission aggrieved by the order, requirement, permit, decision, or determination that is the subject of the appeal.

(B) An application for an appeal shall be filed with the Planning Department. Once the application is complete, the Planning Department shall schedule the appeal for consideration at a public hearing before the Zoning Board of Adjustment. The Department and the administrative officer from whom the appeal is taken shall transmit to the Zoning Board of Adjustment all applications and other records pertaining to such appeal. The application shall be filed no later than 30 days after the date of the contested action.

**LDO § 3.21.**

LDO Chapter 3 is the general provision for appeals as it plainly states that “[a]ny order, requirement, permit, decision, determination, refusal, or interpretation made by any administrative officer in interpreting and/or enforcing the provisions of this Ordinance may be appealed to the Zoning Board of Adjustment, *unless otherwise provided in this Ordinance.*” LDO § 3.21.2 (emphasis added). LDO Chapter 9 specifically provides otherwise as it directs that certain appeals be handled pursuant to LDO Chapter 11. *See* LDO § 9.13. LDO Chapter 10 does not “otherwise provide[]” for an alternative route to appeal, and thus LDO Chapter 3 controls. LDO § 3.21.2.

LDO § 3.21.3 requires that “application shall be filed no later than 30 days after the date of the contested action.” LDO 3.21.3(B). The LDO does not define “contested action[,]” and thus we must consider its plain meaning. *In re R.L.C.*, 361 N.C. 287, 292, 643 S.E.2d 920, 923 (“When the language of a statute is clear and without ambiguity, it is

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the duty of this Court to give effect to the plain meaning of the statute[.]”), *cert. denied*, 552 U.S. 1024, 169 L.Ed. 2d 396 (2007). While there is some disagreement about when this “contested action” began, LDO § 3.21.3(B), the trial court found, and no party contests, that “Fairway first became aware, on its own accord” of LDO § 10.5.2 in January or February 2006; at this point Fairway was obviously aware there was a compliance issue with its sign as it then “requested an opportunity to discuss [LDO § 10.5.2] with the Town . . . and what needed to be done in order to bring Fairway’s Sign into compliance with the LDO.” Fairway’s own discovery of its sign’s nonconformity did not constitute proper notice to create a “contested action[.]” *id.*, since the LDO also requires a “mailed notice[.]” which would require some form of written notice. But the trial court also found that “[o]n June 23, 2006, . . . the Town sent Fairway the first official notice that the Town considered Fairway’s Sign to be subject to . . . LDO § 10.5.2” and thus “nonconforming[.]” *Id.* So no later than 23 June 2006, the “contested action” regarding Fairway’s sign had occurred. *Id.* However, Fairway did not appeal this “contested action” regarding its non-conforming sign until 6 June 2007; *id.*, almost a year after it had received official notice that it was subject to LDO § 10.5.2. Notice of appeal was required within 30 days pursuant to LDO § 3.21.3(B), so Fairway’s appeal as to the compliance issues with its sign pursuant to LDO § 10.5.2 was not timely. *See id.*

**III. Civil Penalties**

[2] Because the trial court found Fairway’s appeal regarding the sign’s compliance to be timely, it ultimately addressed this case on the merits and agreed with Fairway; this resulted in the conclusion that no civil penalties should be assessed against Fairway. As we have concluded that Fairway did not timely appeal the issue of the sign’s compliance, we remand for the trial court to reconsider the issue of civil penalties in light of our opinion.

**IV. Unlisted Use**

[3] Lastly, the trial court determined that Fairway’s sign should be approved as an “unlisted use” pursuant to LDO § 12.2.1 which provides in pertinent part, “Where a particular use category or use type is not specifically allowed under this Ordinance, the Planning Director may permit the use category or type upon a finding that the criteria of subsection (2) below are met.” LDO § 12.3.1(C)(1). In its memorandum of decision the trial court engages in a lengthy analysis of the relevant provisions to explain why an “unlisted use” should

## FAIRWAY OUTDOOR ADVER. v. TOWN OF CARY

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have been allowed. However, the trial court's decision ignores the plain language of LDO § 12.3.1(C)(1) which states that "the Planning Director *may* permit" an unlisted use, not that the Planning Director *must*. *Id.* (emphasis added). LDO § 12.2.10 provides that "The words 'may' and 'should' are permissive in nature." LDO § 12.2.10. Accordingly, the LDO vests the Planning Director with discretion to determine when an "unlisted use" should be allowed, based upon the factors set forth in the ordinance. *See* LDO § 12.3.1(C)(1). We perceive no basis for the determination that the Planning Director abused his discretion under the LDO. The Planning Director's discretionary decision not to approve the sign for an "unlisted use" is not error as the Planning Director was not required to do so. LDO § 12.3.1(C)(1); *see* LDO § 12.2.10.

## V. Conclusion

We reverse that portion of the order and judgment determining that Fairway's appeal regarding compliance was timely, all provisions regarding the merits that were dependent on the timeliness of the appeal, and the determination that Fairway's sign must be permitted as an "unlisted use." We remand for further consideration of the issue of civil penalties in light of this opinion.

REVERSED in part and REMANDED in part.

Judge STEELMAN concurs.

Judge, HUNTER, JR., Robert N. concurs in result only.

**FALK v. FANNIE MAE**

[225 N.C. App. 685 (2013)]

MICHAEL A. FALK, AS TRUSTEE OF THE TRUST DATED 10-26-1989 HAVING  
THE TAX ID NUMBER 65-6043718 (AKA "THE CHARLOTTE FALK  
IRREVOCABLE TRUST"), PLAINTIFF

v.

FANNIE MAE (AKA FEDERAL NATIONAL MORTGAGE ASSOCIATION);  
GLASSRATNER MANAGEMENT & REALTY ADVISORS LLC; IDELL FLOURNEY;  
SONYA PETIT; LIBA MEIERE; SHAWNEQUA DODSON; ADOLFO ZARATE; TISHAUN  
WHITEHEAD; AND JOHN DOES #1 - #160 BEING THE UNIDENTIFIED LESSEES OF  
THE APARTMENT UNITS AT THE PROPERTY KNOWN AS "RIDGEWOOD  
APARTMENTS," DEFENDANTS

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FANNIE MAE (AKA FEDERAL NATIONAL MORTGAGE ASSOCIATION),  
THIRD PARTY PLAINTIFF

v.

MICHAEL A. FALK, AS TRUSTEE OF THE TRUST DATED 10-26-1989 HAVING  
THE TAX ID NUMBER 65-6043718 (AKA "THE CHARLOTTE FALK IRREVOCABLE TRUST")  
AND QUICKSILVER, LLC, THIRD PARTY DEFENDANTS

No. COA12-764

Filed 5 March 2013

**1. Mortgages and Trusts—deed of trust—valid, enforceable, and superior lien—summary judgment improper**

The trial court erred in a deed of trust case by entering summary judgment in favor of defendant Federal National Mortgage Association (FNMA). The trial court improperly relied on N.C.G.S. § 45-37(b) to conclude that the Charlotte Falk Irrevocable Trust's (Trust) lien on the property at issue had expired and the Trust's lien remained valid, enforceable, and superior to FNMA's lien.

**2. Mortgages and Trusts—foreclosure—valid and superior lien—not extinguished by foreclosure—right to foreclose under deed**

The trial court erred in a foreclosure action by reversing an order allowing plaintiff Charlotte Falk Irrevocable Trust (Trust) to proceed with foreclosure on the property at issue. The Trust's lien on the property was valid and superior to defendant Federal National Mortgage Association's (FNMA) lien. Therefore, the Trust's lien was not extinguished by the foreclosure of the FNMA Deed and the Trust had the right under the deed of trust to foreclose on the property.

**FALK v. FANNIE MAE**

[225 N.C. App. 685 (2013)]

Appeal by plaintiff from order entered 9 March 2012 by Judge Lindsay R. Davis, Jr., in Guilford County Superior Court. Heard in the Court of Appeals 15 November 2012.

*Forman Rossabi Black, P.A., by Gavin J. Reardon and Amiel J. Rossabi, for plaintiff appellant.*

*Carruthers & Roth, P.A., by Rachel S. Decker and J. Patrick Haywood, for defendant appellees.*

McCULLOUGH, Judge.

Michael A. Falk (“plaintiff”), as trustee of “The Charlotte Falk Irrevocable Trust,” a trust dated 26 October 1989 having the tax identification number 65-6043718 (the “Trust”), appeals from the trial court’s order granting summary judgment in favor of Fannie Mae, also known as the Federal National Mortgage Association (“FNMA”). For the following reasons, we reverse the trial court’s grant of summary judgment and remand for entry of an order consistent with this opinion.

### I. Background

In 1992, Quicksilver Corporation (the “corporation”), which sometime thereafter changed its name to Hermes Corporation, acquired Ridgewood Apartments (the “property”) for \$5,150,000.<sup>1</sup> At the time of the acquisition, the corporation financed \$4,600,000 through the seller and borrowed the remaining \$550,000 from the Trust.

On 27 October 1994, the corporation transferred the property to Quicksilver, LLC (“Quicksilver”), a limited liability company formed 26 October 1994 for the single purpose of owning the property. Plaintiff and his son, Harry S. Falk, were the member managers of Quicksilver.

Following the transfer, on 28 October 1994, Quicksilver executed a promissory note payable on demand to the Trust in the amount of \$600,000 (the “Trust Note”). The promissory note further indicated that it was “executed to evidence [the] debt incurred for the purchase of [the property], and [was] secured by a grant of a Deed of Trust on the Property dated October 28, 1994.” The 28 October 1994 deed of trust (the “Trust Deed”) encumbering the property for the benefit of the Trust was recorded in Guilford County on 30 December 1994.

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1. It is unclear from the record which name the corporation was using at the time of the acquisition. Yet, for purposes of this appeal, the corporate name is irrelevant.



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Plaintiff, on behalf of the Trust, made a demand for payment on the promissory note in December 1994. Quicksilver defaulted; and despite making several payments to the Trust over the years, Quicksilver failed to remedy the default and remains in default to this day. Quicksilver's last payment to the Trust was received 12 November 2008.

Years after the Trust loaned funds to the corporation for the acquisition of the property, Wachovia Bank, N.A. ("Wachovia") loaned additional funds to Quicksilver. In order to secure the repayment of the Wachovia loans, on 2 July 1999, Quicksilver executed a Deed of Trust, Assignments of Rents, Security Agreement, and Financing Statement (the "Wachovia Deed") encumbering the property for the benefit of Wachovia. The Wachovia Deed was recorded in Guilford County on 7 July 1999. In connection with the Wachovia Deed, the Trust also executed a subordination agreement on 28 February 2000, agreeing to subordinate its interest in the property to Wachovia's interest. The subordination agreement was recorded in Guilford County on 15 March 2000.

Thereafter, on 14 May 2001, Quicksilver refinanced its debt to Wachovia by borrowing funds from Lend Lease Mortgage Capital, L.P. ("Lend Lease"). The funds borrowed from Lend Lease were sufficient to satisfy the Wachovia debt. In order to obtain the Lend Lease loan, Quicksilver executed a Multifamily Note (the "FNMA Note") and secured the note by executing a Multifamily Deed of Trust, Assignment of Rents, and Security Agreement (the "FNMA Deed") encumbering the property for the benefit of Lend Lease. The FNMA Note and FNMA Deed were executed, delivered, and recorded in Guilford County on 14 May 2001.

Following recordation, Lend Lease assigned its interest in the FNMA Note and FNMA Deed to FNMA.

When Quicksilver subsequently defaulted on the FNMA Note, FNMA demanded that Quicksilver pay all amounts due. After Quicksilver failed to remedy the default, FNMA proceeded to foreclose on the property. FNMA was the highest bidder at the 21 July 2011 public sale, and the property was transferred to FNMA pursuant to a substitute trustee's deed dated 2 August 2011.

Following acquisition of the property by FNMA, the Trust demanded by letter dated 7 September 2011 that FNMA pay off the amount owed on the Trust Note. The demand letter claimed that the Trust was owed principal and interest totaling \$3,525,977.05.

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On 6 October 2011, plaintiff filed a verified complaint against FNMA and other defendants seeking a declaratory judgment affirming that the Trust Deed was a valid and enforceable lien on the property and that individual provisions in the Trust Deed, specifically the assignment of rents provision, were valid and enforceable. Plaintiff's verified complaint additionally sought an injunction to enjoin FNMA and the other defendants from collecting rents from residents of the property and interfering with plaintiff's attempts to manage and supervise the property.

In a separate action, plaintiff also sought to foreclose on the property pursuant to the Trust Deed (the "foreclosure action"). A Notice of Hearing Prior to Foreclosure of Deed of Trust was filed on 27 October 2011. The foreclosure action came on for hearing on 17 November 2011 before an Assistant Clerk of Guilford County Superior Court. Following the hearing, the Assistant Clerk filed Findings of Fact and Order of Foreclosure allowing the Trust to proceed with the foreclosure.

On 28 November 2011, FNMA appealed the Findings of Fact and Order of Foreclosure to the superior court.

On 9 December 2011, FNMA filed an answer to plaintiff's verified complaint and additionally filed a counterclaim and third-party complaint. Furthermore, FNMA moved the court for a temporary restraining order and a preliminary injunction to enjoin the foreclosure action.

FNMA's motion for a temporary restraining order came on for hearing at the 16 December 2011 Civil Session of Guilford County Superior Court, the Honorable Patrice A. Hinnant presiding. On 22 December 2011, an order was filed granting FNMA's motion for a temporary restraining order and further ordering that FNMA's appeal from the foreclosure action, FNMA's motion for a preliminary injunction, and any summary judgment motions in plaintiff's declaratory judgment action filed in the interim be scheduled jointly for hearing the week of 16 January 2012.

Before the scheduled hearing, FNMA filed a motion for summary judgment on 6 January 2012, and plaintiff filed a motion for summary judgment on 9 January 2012.

During the 17 January 2012 Civil Session of Guilford County Superior Court, FNMA's appeal from the foreclosure action, FNMA's motion for a preliminary injunction, and FNMA's and plaintiff's

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motions for summary judgment came on for hearing before the Honorable Lindsay R. Davis, Jr.

On 9 March 2012, the trial court filed an order granting summary judgment in favor of FNMA and reversing the order in the foreclosure action entered by the Assistant Clerk of Superior Court. Plaintiff appealed.

## II. Analysis

Plaintiff raises the following issues on appeal: whether the trial court erred by (1) granting summary judgment in favor of FNMA; and (2) reversing the order of foreclosure entered by the Assistant Clerk of Superior Court.

### (1) Summary Judgment

[1] The primary issue on appeal is whether the trial court erred in entering summary judgment in favor of FNMA.<sup>2</sup> In order to resolve this issue, the determinative inquiry that we must decide is whether the Trust's lien on the property remains valid, enforceable, and superior to FNMA's lien. Upon review of the record and applicable law, we hold that it does.

"Our standard of review of an appeal from summary judgment is de novo; such judgment is appropriate only when the record shows that 'there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law.' " *In re Will of Jones*, 362 N.C. 569, 573, 669 S.E.2d 572, 576 (2008) (quoting *Forbis v. Neal*, 361 N.C. 519, 524, 649 S.E.2d 382, 385 (2007)). Particularly pertinent in this case, "[i]f the granting of summary judgment can be sustained on any grounds, it should be affirmed on appeal. If the correct result has been reached, the judgment will not be disturbed even though the trial court may not have assigned the correct reason for the judgment entered." *Shore v. Brown*, 324 N.C. 427, 428, 378 S.E.2d 778, 779 (1989).

At the outset of our analysis, we note that "North Carolina is a 'pure race' jurisdiction, in which the first to record an interest in land holds an interest superior to all other[s] . . . ." *Rowe v. Walker*, 114 N.C. App. 36, 39, 441 S.E.2d 156, 158 (1994); *see also* N.C. Gen. Stat. §§ 47-18 and -20 (2011). Thus, considering only recordation, the Trust,

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2. The issues plaintiff presents in his brief are really arguments in support of his contention that the trial court erred by entering summary judgment in favor of FNMA. Therefore, we address plaintiff's arguments under the general heading "Summary Judgment."

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which recorded the Trust Deed on 30 December 1994, has an interest in the property superior to that of FNMA, whose predecessor in interest, Lend Lease, first recorded the FNMA Deed on 14 May 2001. However, FNMA does not contend that their interest was recorded prior to the Trust's interest. Instead, FNMA argues that the Trust's interest in the property either expired pursuant to the new life of lien statute or that equitable subrogation places them in the priority of Wachovia's past interest. We address these arguments in order.

Expiration of Lien

In granting summary judgment in favor of FNMA below, the trial court relied on N.C. Gen. Stat. § 45-37(b) to conclude that the Trust's lien on the property had expired. As argued by plaintiff and conceded by FNMA, the trial court's reliance on N.C. Gen. Stat. § 45-37(b) was improper.

In general, N.C. Gen. Stat. § 45-37(b)(1)(2) (2011) establishes a conclusive presumption that the terms of a security instrument recorded before 1 October 2011 have been satisfied from and after the expiration of fifteen years from the latter of "(1) [t]he date when the conditions of the security instrument were required by its terms to have been performed, or (2) [t]he date of maturity of the last installment of debt or interest secured thereby[.]" Moreover, the life of lien provision in the statute provides:

The lien of any security instrument that secured the payment of money or the performance of any other obligation or obligations and that was conclusively presumed to have been fully paid and performed prior to October 1, 2011, pursuant to the provisions of this subsection is conclusively deemed to have expired and shall be of no further force or effect. No release, satisfaction, or other instrument is necessary to discharge the lien of a security instrument that has expired; however, nothing in this section shall be construed as affecting or preventing the execution and recordation of any such release, satisfaction, or other document.

*Id.*

As decided by our Supreme Court in *Smith v. Davis*, 228 N.C. 172, 45 S.E.2d 51 (1947),<sup>3</sup> the conclusive presumption established in

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3. *Smith v. Davis* interpreted N.C. Gen. Stat. § 45-37(5), the precursor statute to N.C. Gen. Stat. § 45-37(b).

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N.C. Gen. Stat. § 45-37(b) does not arise until after the expiration of the fifteen-year period and does not benefit those who gain an interest in the property before the presumption arises. *Smith*, 228 N.C. at 178, 45 S.E.2d at 56. In light of the primary purpose of the statute, “to promote freer marketability in cases where old and unsatisfied mortgages and deeds of trust, securing debts, were hampering real estate transaction,” the Court held that the conclusive presumption arises only in favor of creditors and purchasers for valuable consideration who rely on the presumption when contracting. *Id.* at 180, 45 S.E.2d at 57.

In the present case, the FNMA Deed was recorded and assigned to FNMA on 14 May 2001, approximately six and a half years after the Trust Deed was recorded on 30 December 1994. Accordingly, the statutory presumption had not arisen at the time FNMA acquired a lien on the property and FNMA could not have relied on the presumption. For this reason alone, the trial court erred in entering summary judgment in favor of FNMA on the basis of N.C. Gen. Stat. § 45-37(b).

This, however, is only the beginning of our analysis where, on appeal, summary judgment should be affirmed if it can be sustained on any ground. *See Brown*, 324 N.C. at 428, 378 S.E.2d at 779.

Despite conceding that the trial court erred in granting summary judgment on the basis of N.C. Gen. Stat. § 45-37(b), FNMA contends that the trial court’s grant of summary judgment is appropriate because the Trust Deed expired pursuant to the new life of lien statute, N.C. Gen. Stat. § 45-36.24, specifically subsections (b)(1)(a) and (b)(1)(c)(1). Assuming arguendo that N.C. Gen. Stat. § 45-36.24(b)(1)(a) is constitutionally applicable to this case, we agree that subsection (b)(1)(a) is controlling.

The pertinent portion of N.C. Gen. Stat. § 45-36.24(b) provides:

Except as provided in subsection (g) of this section, unless the lien of a security instrument has been extended in the manner prescribed in subsection (c), (d), or (e) of this section, the security instrument has been foreclosed, or the security instrument has been satisfied of record pursuant to G.S. 45-37, the lien of a security instrument automatically expires, and the security instrument is conclusively deemed satisfied of record pursuant to G.S. 45-37, at the earliest of the following times:

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- (1) If the security instrument was first recorded before October 1, 2011:
  - a. If the maturity date of the secured obligation is stated in the security instrument, 15 years after the maturity date.

N.C. Gen. Stat. § 45-36.24(b) (2011).<sup>4</sup> Moreover, “[t]he maturity date of the secured obligation is ‘stated’ in a security instrument if . . . (iii) the maturity date of the secured obligation . . . can be ascertained or determined from information contained in the security instrument . . . .” N.C. Gen. Stat. § 45-36.24(a)(1)(c). “If all sums owing on the secured obligation are due and payable in full on demand and no alternative date is specified in the secured obligation for payment in full, the maturity date of the secured obligation is the date of the secured obligation.” N.C. Gen. Stat. § 45-36.24(a)(1)(b).

Here, the Trust Note indicates that it is a demand note executed on 28 October 1994. Furthermore, no alternative date is specified for payment in full. Applying the above-quoted provisions of N.C. Gen. Stat. § 45-36.24 to these facts, we conclude that the maturity date of the Trust Note is the execution date and that the maturity date is stated in the security instrument for purposes of the statute. Thus, it necessarily follows that the Trust Note was conclusively deemed satisfied and the lien in the Trust Deed automatically expired on 28 October 2009, fifteen years after the maturity date.

Despite the unambiguous language in the statute, plaintiff contends that N.C. Gen. Stat. § 45-36.24 is not controlling in this case because our Supreme Court’s reasoning in *Smith v. Davis* concerning N.C. Gen. Stat. § 45-37(b), discussed *supra*, applies with “equal vigor” to N.C. Gen. Stat. § 45-36.24. We disagree.

Whereas N.C. Gen. Stat. § 45-37(b) contains the limiting language, “[i]t shall be *conclusively presumed* that the conditions are . . . complied with or the debts secured thereby paid . . . *as against creditors or purchasers for valuable consideration . . . from and after the expiration of 15 years* from whichever . . . occurs *last*[,]”, N.C. Gen. Stat. § 45-37(b) (emphasis added), N.C. Gen. Stat. § 45-36.24(b) contains no such limiting language. Besides the stated exceptions, N.C. Gen. Stat. § 45-36.24(b) is absolute in providing that “the lien of a

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4. The exceptions in subsections (c), (d), (e), and (g) are irrelevant in the present case as plaintiff took no steps to extend the Trust’s lien or to foreclose on the property prior to the expiration of the lien under the statute.

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security instrument *automatically expires*, and the security instrument is *conclusively deemed satisfied* of record . . . at the *earliest* of the [listed] times[.]” N.C. Gen. Stat. § 45-36.24(b) (emphasis added). There is no language in N.C. Gen. Stat. § 45-36.24(b) that would prevent a lien from expiring as to a party acquiring an interest in the collateral before the expiration of the fifteen-year period.

Plaintiff also contends that N.C. Gen. Stat. § 45-36.24(b) is not controlling because the statute is unconstitutional as applied to this case.<sup>5</sup> Specifically, plaintiff contends that retroactive application of N.C. Gen. Stat. § 45-36.24(b) to this case violates N.C. Const. art. I, § 19, U.S. Const. art. I, § 10, and/or U.S. Const. amend. XIV, § 1, because it retroactively impairs the Trust’s vested rights. We agree.

In general, there is no constitutional limitation that prohibits the passage of retroactive laws. *Bateman v. Sterrett*, 201 N.C. 59, 63, 159 S.E. 14, 17 (1931). However, the General Assembly may not enact retroactive laws that impair the obligation of contracts or disturb vested rights. *Id.* “When a statute would have the effect of destroying a vested right if it were applied retroactively, it will be viewed as operating prospectively only.” *Bolick v. American Barmag Corp.*, 306 N.C. 364, 371, 293 S.E.2d 415, 420 (1982).

In this case, the Trust’s interest in the property vested on 28 October 1994 upon Quicksilver’s execution of the Trust Note and the Trust Deed. At that time, N.C. Gen. Stat. § 45-36.24 had not been enacted by the General Assembly. N.C. Gen. Stat. § 45-36.24 did not take effect until 1 October 2011. In regard to the Trust’s vested rights, as previously discussed, the effect of retroactive application of N.C. Gen. Stat. § 45-36.24 to this case is to cause the Trust’s lien on the property to automatically expire to the benefit of all subsequently acquired interests in the property on 28 October 2009, fifteen years after the maturity date of the security instrument. Thus, the retroactive application of N.C. Gen. Stat. § 45-36.24 destroys the Trust’s vested rights to the benefit of FNMA.

Furthermore, “[i]t is well settled that the general laws of the State in force at the time of the execution of a contract enter into and become a part thereof.” *Bank v. Derby*, 218 N.C. 653, 658, 12 S.E.2d 260, 263 (1940). At the time the Trust gained a security interest in the property pursuant to the Trust Deed, N.C. Gen. Stat. § 45-37 governed the expiration of the Trust’s lien. Yet, as previously discussed, the

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5. The trial court avoided this argument by relying on N.C. Gen. Stat. § 45-37(b), which was in effect when the Trust Deed was executed on 28 October 1994.

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Trust's lien has not expired to the benefit of FNMA pursuant to N.C. Gen. Stat. § 45-37(b), because FNMA acquired their interest in the property prior to the time the statutory presumption took effect.

As a result, the Trust's lien has not expired to the benefit of FNMA. Although we agree that the Trust's lien expired pursuant to the terms of N.C. Gen. Stat. § 45-36.24(b)(1), we find that the statute is unconstitutional as applied to this case.

**Subrogation**

In a final effort to uphold the trial court's grant of summary judgment in its favor, FNMA contends that principles of equitable subrogation entitle it to the lien priority of Wachovia, superior to that of the Trust. Consequently, FNMA asserts that foreclosure of the FNMA Deed extinguished any interest the Trust had under the Trust Deed. We disagree.

“ ‘Subrogation is a consequence which equity attaches to certain conditions. It is not an absolute right, but one which depends on the equities and attending facts and circumstances of each case.’ ” *First Union Nat. Bank of North Carolina v. Lindley Laboratories, Inc.*, 132 N.C. App. 129, 130, 510 S.E.2d 187, 188 (1999) (quoting 73 Am. Jur. 2d *Subrogation* § 11 (1974)).

In *Wallace v. Brenner*, 200 N.C. 124, 156 S.E. 795 (1931), our Supreme Court explained that equitable subrogation does not arise in favor of a “mere volunteer” who advances funds that are used to discharge a prior encumbrance. *Id.* at 131, 156 S.E. at 798. But,

where money is expressly advanced in order to extinguish a prior encumbrance, and is used for this purpose, with the just expectation on the part of the lender of obtaining a valid security, . . . the lender . . . may be subrogated to the rights of the prior encumbrancer whose claim he has satisfied, there being no intervening equity to prevent. It is of the essence of this doctrine that equity does not allow the encumbrance to become satisfied as to the advancer of the money for such purposes, but as to him keeps it alive, and as though it had been assigned to him as security for the money.

*Id.* at 131, 156 S.E. at 798-99 (internal quotation marks and citations omitted). Applying this rule to the facts in *Wallace*, the Court found that where the lender seeking subrogation was not a mere volunteer and was not guilty of culpable negligence, and where the intervening



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lienor was not prejudiced, it would be inequitable not to grant the lender subrogation.<sup>6</sup> *Id.* at 133, 156 S.E. at 799.

It is this reasoning from *Wallace* on which FNMA now relies to argue for equitable subrogation in this case, where Lend Lease loaned Quicksilver money for the express purpose of paying off Quicksilver's debt to Wachovia and Quicksilver agreed to give the FNMA Deed first priority.

However, in *Peek v. Wachovia Bank & Trust Co.*, our Supreme Court inferred that equitable subrogation was only entitled to those "excusably ignorant" of an intervening lien. 242 N.C. 1, 15, 86 S.E.2d 745, 755 (1955) ("[A]s a general rule one who furnishes money for the purpose of paying off an encumbrance on real or personal property, at the instance either of the owner of the property or of the holder of the encumbrance, either upon the express understanding or under circumstances from which an understanding will be implied, that the advance made is to be secured by a first lien on the property, *will be subrogated to the rights of the prior lienholder as against the holder of an intervening lien, of which the lender was excusably ignorant.*"). (emphasis added). Although excusable ignorance was not determinative in *Peek*, in *First Union Nat. Bank of North Carolina v. Lindley Laboratories, Inc.*, this Court relied on the language in *Peek* and determined the lender was not entitled to equitable subrogation, because it was not excusably ignorant of an intervening lien. 132 N.C. App. at 130-31, 510 S.E.2d at 188-89.

In this case, the Trust, having subordinated its lien to that of Wachovia, is in the position of an intervening lienor. Thus, where the Trust's lien was recorded, FNMA cannot claim excusable ignorance. Furthermore, where FNMA had notice of the Trust's lien, FNMA could have taken steps to guarantee itself first priority. FNMA, however, failed to successfully do so. Despite common management, the Trust and Quicksilver are separate entities; thus, an agreement by Quicksilver to grant FNMA first priority is not binding on the Trust. Lastly, we see the potential for prejudice to the third-party beneficiaries of the trust if FNMA was subrogated to the status of Wachovia. As a result, we hold that subrogation would be inequitable in this instance.

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6. "The exceptions to the general rule to the doctrine of subrogation [are]: (1) The relief is not granted to a volunteer; (2) nor where the party claiming relief is guilty of culpable negligence; (3) nor where to grant relief will operate to the prejudice of the junior lienholder." *Wallace*, 200 N.C. at 132, 156 S.E. at 799.

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[225 N.C. App. 696 (2013)]

**(2) Foreclosure**

**[2]** Plaintiff also contends that the trial court erred in reversing the order filed in the foreclosure action allowing the Trust to proceed with foreclosure on the property. We agree.

For the reasons discussed above, the Trust's lien on the property was valid and superior to FNMA's lien. Therefore, the Trust's lien was not extinguished by the foreclosure of the FNMA Deed and the Trust has the right under the Trust Deed to foreclose on the property.

**III. Conclusion**

For the reasons discussed above, we reverse the trial court's grant of summary judgment in favor of FNMA and remand for entry of an order consistent with this opinion. Additionally, we reverse the trial court's order reversing the order of foreclosure entered by the Assistant Clerk of Superior Court.

Reversed and remanded.

Judges GEER and STEPHENS concur.

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JUDITH VAUGHN HANKINS, PLAINTIFF  
v.  
JANICE VAUGHN BARTLETT, DEFENDANT

No. COA12-1051

Filed 5 March 2013

**1. Appeal and Error—interlocutory orders and appeals—final judgment—no just reason for delay**

The Court of Appeals addressed the merits of plaintiff's interlocutory appeal in a wills case where there was a final judgment as to two of plaintiff's five claims and the trial court certified that there was no just reason for delay of the appeal.

**2. Contracts—reciprocal wills—statute of frauds**

The trial court did not err in a case involving a purported contract between a husband and a wife to make and keep in force reciprocal wills by concluding it must satisfy the statute of frauds. Without evidence of such written contract, defendant was entitled to judgment as a matter of law.

**HANKINS v. BARTLETT**

[225 N.C. App. 696 (2013)]

Appeal by defendant from judgment entered 8 May 2012 by Judge F. Lane Williamson, in Catawba County Superior Court. Heard in the Court of Appeals 10 January 2013.

*Smith, James, Rowlett & Cohen, LLP, by Norman B. Smith, for plaintiff-appellant.*

*Sigmon, Clark, Mackie, Hanvey & Ferrell, P.A., by Stephen L. Palmer and Amber R. Reinhardt, for defendant-appellee.*

HUNTER, JR., Robert N., Judge.

Judith Vaughn Hankins (“Plaintiff”) appeals an order granting partial summary judgment for Janice Vaughn Bartlett (“Defendant”). Plaintiff argues the trial court erred in concluding that a contract between a husband and a wife to make and keep in force reciprocal wills must satisfy the statute of frauds. For the following reasons, we affirm.

### **I. Factual & Procedural Background**

Plaintiff and Defendant are the only children of Edwin Lee Vaughn and Mildred Stanley Vaughn. Mildred Vaughn died in 1983 and her will, executed on 19 October 1977, was admitted to probate. Mildred’s will left her entire estate to her husband Edwin, but in the event of his predeceasing her, the entire estate would have been divided equally between Plaintiff and Defendant.<sup>1</sup>

In April 2010, Edwin Vaughn executed a will leaving his entire estate to an *inter vivos* trust. This will additionally named Defendant executrix of his estate. Edwin later died in May 2010.

Upon determining that she was not a beneficiary of the trust, Plaintiff brought suit on 10 September 2010 seeking (1) a declaratory judgment that Edwin lacked the capacity to execute the trust agreement, (2) a declaratory judgment that the execution of the trust agreement was the product of undue influence and duress, (3) an order allowing Plaintiff to examine a copy of the trust agreement, (4) an order enforcing the terms of a purported contract between Edwin and Mildred Vaughn to maintain joint and mutual wills, and (5) damages for tortious interference on the part of Defendant with respect

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1. Edwin Vaughn purportedly executed an identical will in 1977. Mildred Vaughn’s will mentions that her husband executed a will simultaneously and affidavits in the record assert that Edwin’s original will contained identical terms as his wife’s. However, Edwin’s will was not admitted into evidence and is not part of the record on appeal.

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to the contract. On 7 May 2012 the trial court granted partial summary judgment in favor of Defendant, dismissing Plaintiff's fourth and fifth claims related to the existence of a contract between Edwin and Mildred. On 30 May 2012 Plaintiff filed a timely notice of appeal.

**II. Jurisdiction & Standard of Review**

[1] Preliminarily, we note that the trial court's order granting Defendant's motion for partial summary judgment is interlocutory, as it is an order made during the pendency of the action, which did not dispose of the case. *See Veazey v. City of Durham*, 231 N.C. 357, 362, 57 S.E.2d 377, 381 (1950) (stating that "[a]n interlocutory order is one made during the pendency of an action, which does not dispose of the case, but leaves it for further action by the trial court in order to settle and determine the entire controversy"); *see also Liggett Group v. Sunas*, 113 N.C. App. 19, 23, 437 S.E.2d 674, 677 (1993) ("A grant of partial summary judgment, because it does not completely dispose of the case, is an interlocutory order from which there is ordinarily no right of appeal.").

An interlocutory order is, however, subject to immediate appeal if "the trial court enters a final judgment as to one or more but fewer than all of the claims or parties and the trial court certifies in the judgment that there is no just reason to delay the appeal." *Jeffreys v. Raleigh Oaks Joint Venture*, 115 N.C. App. 377, 379, 444 S.E.2d 252, 253 (1994). Our appellate rules require a party relying on a certification made pursuant to N.C. R. Civ. P. 54(b) to "show that there has been a final judgment as to one or more but fewer than all of the claims or parties and that there has been a certification by the trial court that there is no just reason for delay." N.C. R. App. P. 28(b)(4). Plaintiff's brief having satisfied these requirements, we have jurisdiction to hear the instant appeal.

A grant of summary judgment is proper when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." N.C. R. Civ. P. 56(c). We review a trial court's grant of summary judgment *de novo*. *Craig v. New Hanover Cty. Bd. of Educ.*, 363 N.C. 334, 337, 678 S.E.2d 351, 354 (2009). Under *de novo* review this Court considers the matter anew and freely substitutes its judgment for that of the lower tribunal. *Id.*

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**III. Analysis**

[2] Plaintiff argues the trial court erred in concluding that a contract to create and maintain joint and mutual wills is subject to the statute of frauds, N.C. Gen. Stat. § 22-2 (2011), and that absent evidence of a writing, Defendant was entitled to summary judgment on the contract claims.

Our Supreme Court has long recognized that “an oral contract to convey or to devise real property is void by reason of the statute of frauds.” *Pickelsimer v. Pickelsimer*, 257 N.C. 696, 698, 127 S.E.2d 557, 559 (1962). Additionally, our Supreme Court has previously held that a contract to maintain reciprocal wills is not created by the mere concurrent execution of wills. *Godwin v. Wachovia Bank & Trust Co.*, 259 N.C. 520, 530, 131 S.E.2d 456, 463 (1963). Rather, there must be specific contractual language manifesting an intent to create such a contract, either in a separate document such as a trust agreement, or in the wills themselves. *Collins v. Estate of Collins*, 173 N.C. App. 626, 628, 619 S.E.2d 531, 533 (2005).

Plaintiff, her husband, her son, and a family friend all submitted affidavits asserting that Edwin and Mildred had intended that their 1977 wills be joint and mutual so that, in the event of both of their deaths, their estate would be divided equally between Plaintiff and Defendant. Plaintiff contends that this evidence is sufficient to establish a triable issue of fact as to whether an oral contract existed between Edwin and Mildred to maintain joint and mutual wills.<sup>2</sup> Plaintiff attempts to distinguish the instant case from *Collins* by noting that the Court in *Collins* did not explicitly hold that the “specific contractual language” necessary to create a valid will contract *must* be in writing.

However, the contract between Mildred and Edwin to maintain joint and mutual wills in this case would have necessarily involved devising real property.<sup>3</sup> As such, any agreement to maintain reciprocal wills would be subject to the statute of frauds. Accordingly, Plaintiff’s submission of evidence regarding the existence of an oral contract between Edwin and Mildred in 1977 is insufficient to survive a summary judgment motion.

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2. Plaintiff contends Mildred’s written will provides the terms of the contract.

3. When Mildred’s will was admitted to probate, \$155,015.00 worth of real property was recorded among her assets.

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Plaintiff argues that the our Supreme Court's decision in *Lipe v. Citizens Bank & Trust Co.* supports her contention that will contracts, including those establishing joint and mutual wills, are not subject to the statute of frauds. 207 N.C. 794, 178 S.E. 665 (1935). In *Lipe*, the decedent promised to will all of her property to the plaintiff if he would look after her and manage her affairs. *Id.* at 794-95, 178 S.E. at 665. The decedent died, bequeathing only \$3,000 of a \$16,000 estate to the plaintiff after nineteen years of service. *Id.* The trial court found for the plaintiff and the decision was affirmed by our Supreme Court. *Id.* at 795-96, 178 S.E. at 666.

*Lipe* is immediately distinguishable from the instant case in that the statute of frauds was not at issue. The *Lipe* Court specifically noted that the jury was instructed that the plaintiff sought to recover for the reasonable value of his services, not damages for breach of an alleged contract. *Id.* Thus, *Lipe* is not analogous to the instant case, because the plaintiff did not recover under any purported contract. See *Envtl. Landscape Design Specialist v. Shields*, 75 N.C. App. 304, 305, 330 S.E.2d 627, 628 (1985).

Here, the only writing evidencing any transaction in 1977 is Mildred's will. Contrary to the entire thrust of Plaintiff's argument, Mildred's will contains a clause entitled "No Implied Contract" which provides:

This Will is being executed on the same date as is the Will of my spouse; but in no event shall our Wills be considered joint or mutual, it being our express intention that the survivor shall in no way be restricted in the use, management, enjoyment or disposition of his or her separate estate or property received under the other's Will.

Without evidence of a written contract between Edwin and Mildred executed subsequent to their 1977 wills suggesting differently, Defendant was entitled to judgment on the contract claims as a matter of law.

**IV. Conclusion**

The trial court did not err in granting partial summary judgment for Defendant. As the statute of frauds can be raised as a defense to the enforcement of a contract for the creation and maintenance of joint and mutual wills, Defendant was entitled to judgment as a matter of law.

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AFFIRMED.

Judges STROUD and DAVIS concur.

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DAVID C. HELFRICH, EMPLOYEE, PLAINTIFF

v.

COCA-COLA BOTTLING COMPANY CONSOLIDATED, EMPLOYER, SELF-INSURED  
(GALLAGHER BASSETT SERVICES, INC., THIRD-PARTY ADMINISTRATOR), DEFENDANTS

No. COA12-106

Filed 5 March 2013

**Workers' Compensation—weekly disability compensation rate—misapprehension of law—insufficient findings of fact**

The Industrial Commission erred in a workers' compensation case by failing to consider the potential relevance of N.C.G.S. § 97-34 in determining plaintiff's weekly disability compensation rate and as a result, failed to make sufficient findings of fact to permit the Court of Appeals to determine whether the Commission awarded plaintiff the correct amount of compensation. The case was remanded for further proceedings.

Appeal by plaintiff from Opinion and Award entered 17 November 2011 by the North Carolina Industrial Commission. Heard in the Court of Appeals 14 August 2012.

*The Sumwalt Law Firm, by Vernon Sumwalt and Mark T. Sumwalt, for Plaintiff.*

*McAngus Goudelock and Courie, by Andrew R. Ussery and Daniel L. McCullough, for defendant Coca-Cola Bottling Company.*

ERVIN, Judge.

Plaintiff David C. Helfrich appeals from an order entered by the Industrial Commission awarding Plaintiff temporary total disability compensation at the rate of \$634.28 per week from and after 15 March 2010 pending further order of the Commission. On appeal, Plaintiff contends that the Commission should have based its award upon a weekly compensation rate of \$672.98 stemming from a 12 March 2008

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work-related injury rather than the \$634.28 weekly compensation rate associated with a 20 May 2009 work-related injury. After careful consideration of the Commission's order in light of the record and the applicable law, we hold that the Commission's order should be reversed and that this case should be remanded to the Commission for the entry of a new order containing adequate findings and conclusions.

**I. Factual Background**

Although the substantive facts and procedural history associated with this case are significantly intertwined, the only issue debated in the parties' briefs is the amount of compensation which Plaintiff is entitled to receive for the period from and after 15 March 2010. While the Commission's order contains a number of factual determinations that have a material impact upon the manner in which this case should be resolved, those determinations do not appear to be in dispute at this time and are reflected in the substantive fact statement contained in this opinion as undisputed facts, rather than the statement of the procedural history of this case.

**A. Substantive Facts**

Plaintiff sustained a series of work-related injuries by accident while working as a delivery truck driver for Defendant Coca-Cola. The first of these injuries occurred on 20 September 2006, when Plaintiff injured his shoulder, elbow, and lower back while engaged in repetitive lifting. On 21 November 2006, Dr. Yates Dunaway, an orthopedic surgeon, performed an arthroscopic labral debridement to Plaintiff's left shoulder. Defendant Coca-Cola admitted Plaintiff's right to receive temporary total compensation at a weekly rate of \$543.58 (which the Commission later adjusted to \$550.23) from and after 23 October 2006, which was the date upon which Plaintiff's disability began. As a result of the fact that Plaintiff returned to work on 4 December 2006, he received his last compensation check associated with the 20 September 2006 injury on 28 November 2006. On 21 February 2007, Plaintiff was released to return to work without being subject to any restrictions after having reached the point of maximum medical improvement relating to this left shoulder injury.

On 11 October 2007, Plaintiff sprained his left knee while working in a walk-in cooler. On 19 December 2007, Dr. Jonathan Paul, an orthopedic surgeon, performed a left knee arthroscopy, medial meniscectomy, and chondroplasty. On 9 January 2008, Plaintiff returned to work for Defendant Coca-Cola subject to light duty



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restrictions. At a later time, Dr. Paul determined that Plaintiff had reached the point of maximum medical improvement with respect to this left knee injury and assigned a five percent permanent partial disability rating to Plaintiff's left leg. Ultimately, the parties agreed that Plaintiff was entitled to receive temporary total disability benefits for the period from 19 December 2007 until 8 January 2008 in the weekly amount of \$613.81 (which the Commission later corrected to \$704.32).

On 12 March 2008, Plaintiff injured his right foot when a truck lift gate malfunctioned. Initially, Plaintiff was diagnosed as suffering from a foot contusion and plantar fasciitis and was referred for physical therapy. After Plaintiff continued to report symptoms in his right foot, he received treatment from Dr. E. James Sebold, an orthopedic surgeon specializing in foot and ankle surgery, who diagnosed him as suffering from right-sided plantar fasciitis on 21 August 2008. As a result of the fact that Plaintiff was receiving pain medications from multiple sources, Dr. Sebold referred Plaintiff to Dr. Neil Taub, a physical medicine and rehabilitation specialist, for pain management, including the consolidation of Plaintiff's pain medication prescriptions. At the time that he began to treat Plaintiff on 27 August 2008, Dr. Taub diagnosed Plaintiff as suffering from ankle joint pain and chronic right-sided plantar fasciitis and prescribed certain medications to assist Plaintiff in addressing the effects of that pain. On 13 January 2009, Dr. Sebold released Plaintiff to return to work without restrictions. Dr. Taub, however, imposed a work restriction upon Plaintiff consisting of a "sit-down break every hour" on 23 January 2009. The restriction imposed by Dr. Taub has remained in effect until the present date, so that Plaintiff performed modified duty work for Defendant Coca-Cola as long as he continued to work there. In view of this modified work schedule, the Commission determined that Plaintiff was entitled to temporary partial disability benefits in the weekly amount of \$672.98 for the period from the 12 March 2008 injury until 15 March 2010, when Plaintiff was terminated from his employment with Defendant Coca-Cola.

On 20 May 2009, Plaintiff injured his right knee and ankle when he slipped while stepping off of a forklift, with the disability period associated with this injury running from 17 June through 29 June 2009. On 17 June 2009, Plaintiff was referred to Dr. Dana Piasecki, an orthopedic surgeon, who continued to treat Plaintiff for both of his knee injuries through the date of the hearing held in this case before the Deputy Commissioner. After continuing to experience knee-

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related problems following his return to light duty work on 29 June 2009, Plaintiff underwent a right knee arthroscopy, debridement, and partial medial meniscectomy on 13 January 2010. On 8 February 2010, Plaintiff returned to work subject to restrictions that he do no prolonged bending, stooping, squatting, kneeling, twisting, or lifting and that all of his work be performed in a sitting position. Although Defendant Coca-Cola initially paid temporary total disability compensation to Plaintiff at a weekly rate of \$626.74 relating to this injury, it later stipulated that the appropriate weekly rate was \$634.28.

After returning to work on 8 February 2010, Plaintiff experienced ongoing problems stemming from his knee injuries. Throughout the period following the 20 May 2009 injury, Plaintiff continued to receive pain management services from Dr. Taub, who provided Plaintiff with medications for use in addressing the pain associated with both his right foot and knee pain.<sup>1</sup> On 15 March 2010, Plaintiff was discharged from his employment with Defendant Coca-Cola for falling asleep at work on 11 March 2010. Subsequently, based upon opinion testimony provided by Dr. Taub, the Commission found that Plaintiff fell asleep at work due to the effects of the medication that he had been taking for the pain associated with his right foot and knee injuries and that his termination did not constitute a constructive refusal to accept employment sufficient to bar the receipt of workers' compensation benefits. In addition, the Commission found that Defendant made a reasonable, but unsuccessful, effort to find alternative employment between the termination of his employment with Defendant Coca-Cola on 15 March 2010 and 30 September 2010, when Dr. Piasecki instructed Plaintiff to refrain from performing any work in anticipation of the need for further surgery.<sup>2</sup> Plaintiff has been under restrictions imposed by Dr. Piasecki since 29 April 2010.

**B. Procedural History**

On 14 May 2010, Plaintiff filed a Form 33 in each of the four Commission proceedings arising from the work-related injuries

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1. As a result of his various injuries, Plaintiff was either restricted from working entirely or allowed to work subject to restrictions for the entire period of time from 12 March 2008 until the termination of his employment with Defendant Coca-Cola on 15 March 2010.

2. Dr. Piasecki had released Plaintiff to return to work without restrictions on 15 April 2010. However, given that Plaintiff experienced a significant increase in pain upon returning to work, Dr. Piasecki reinstated the previously imposed restrictions on 29 April 2010. The restrictions in question remained in effect as of the date of the evidentiary hearing held in this case.

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which he had sustained, alleging that the parties had been unable to agree upon the amount of compensation which Plaintiff was entitled to receive from the period beginning on 9 March 2010 and continuing until the present and requesting that the Commission resolve that dispute. On 8 June and 16 June 2010, Defendants filed four Form 33Rs, alleging that Plaintiff was not entitled to receive any workers' compensation benefits. In response to a motion filed by Plaintiff, the Commission entered orders on 28 June and 7 July 2010 consolidating Plaintiff's claims for mediation, hearing, and decision.

On 21 October 2010, Plaintiff's claims were heard before Deputy Commissioner Victoria M. Homick. On 27 May 2011, Deputy Commissioner Homick entered an order providing, in pertinent part, that Plaintiff was entitled to receive temporary total disability payments at the rate of \$634.28 per week from and after 15 March 2010, subject to an offset in the amount of \$466.00 per week from 15 March 2010 until 29 September 2010 relating to unemployment compensation benefits that Plaintiff received. On 31 May 2011, Plaintiff noted an appeal to the Commission from Deputy Commissioner Homick's order.

On 17 November 2011, the Commission entered an order prepared by Commissioner Danny Lee McDonald, with the concurrence of Chair Pamela T. Young and Commissioner Christopher Scott, affirming Deputy Commissioner Homick's decision, subject to minor modifications.<sup>3</sup> In its order, the Commission concluded as a matter of law that:

8. As a direct and proximate result of plaintiff's compensable injuries by accident to his right foot on March 12, 2008, and right knee on May 20, 2009, plaintiff has been unable to earn the same or greater wages as he was earning in the same or any other employment from March 15, 2010, and continuing. As a result, plaintiff is entitled to receive temporary total disability compensation at the rate of \$634.28 per week, continuing until further Order of the Industrial Commission. N.C. Gen. Stat. § 97-29.

On 22 November 2011, Plaintiff filed a motion seeking reconsideration of the Commission's decision with respect to the amount of the temporary total disability payment which Plaintiff was entitled to

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3. The Commission also addressed and resolved numerous other issues in this order which have not been addressed in the parties' briefs and which we have not, for that reason, discussed in this opinion.

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receive. The Commission denied Plaintiff's reconsideration motion on 21 December 2011. Plaintiff noted an appeal to this Court from the Commission's decision.

## II. Legal Analysis

### A. Standard of Review

Appellate review of a Commission order is "limited to reviewing whether any competent evidence supports the Commission's findings of fact and whether the findings of fact support the Commission's conclusions of law," with the Commission having sole responsibility for evaluating the weight and credibility to be given to the record evidence. *Deese v. Champion Int'l Corp.*, 352 N.C. 109, 116, 530 S.E.2d 549, 553 (2000). "[F]indings of fact which are left unchallenged by the parties on appeal are 'presumed to be supported by competent evidence' and are, thus 'conclusively established on appeal.'" *Chaisson v. Simpson*, 195 N.C. App. 463, 470, 673 S.E.2d 149, 156 (2009) (quoting *Johnson v. Herbie's Place*, 157 N.C. App. 168, 180, 579 S.E.2d 110, 118, *disc. review denied*, 357 N.C. 460, 585 S.E.2d 760 (2003)). However, the "Commission's conclusions of law are reviewed *de novo*." *McRae v. Toastmaster, Inc.*, 358 N.C. 488, 496, 597 S.E.2d 695, 701 (2004). In order to facilitate appropriate appellate review, "the Commission must make specific findings with respect to crucial facts upon which the question of plaintiff's right to compensation depends." *Sheehan v. Perry M. Alexander Constr. Co.*, 150 N.C. App. 506, 511, 563 S.E.2d 300, 303 (2002) (quoting *Gaines v. Swain & Son, Inc.*, 33 N.C. App. 575, 579, 235 S.E.2d 856, 859 (1997) (quotation marks omitted); see also *Johnson v. Southern Tire Sales & Servl*, 358 N.C. 701, 705, 599 S.E.2d 508, 511-12 (2004) (stating that, "[w]hile the Commission is not required to make findings as to each fact presented by the evidence, it must find those crucial and specific facts upon which the right to compensation depends so that a reviewing court can determine on appeal whether an adequate basis exists for the Commission's award") (citing *Guest v. Brenner Iron & Metal Co.*, 241 N.C. 448, 451, 85 S.E.2d 596, 599 (1955) and *Singleton v. Durham Laundry Co.*, 213 N.C. 32, 34-35, 195 S.E. 34, 35-36 (1938)). In addition, "if the Commission acts under a misapprehension of the law, . . . the award [should] 'be set aside and the case remanded for a new determination using the correct legal standard.'" *Coe v. Haworth Wood Seating*, 166 N.C. App. 251, 254, 603 S.E.2d 549, 551 (2004) (quoting *Ballenger v. ITT Grinnell Indus. Piping, Inc.*, 320 N.C. 155, 158, 357 S.E.2d 683, 685 (1987)).

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B. Appropriate Compensation Rate

As we have already noted, the ultimate issue which we must decide in this case is whether the Commission appropriately determined the disability benefit rate that Plaintiff is entitled to receive from and after 15 March 2010. Although the Commission determined that the appropriate rate was \$634.28 per week, Plaintiff contends that the Commission was required by N.C. Gen. Stat. § 97-34 to utilize a \$672.98 rate instead. As a result, a proper resolution of Plaintiff's challenge to the Commission's decision requires an analysis of the manner in which any disability payments to which Plaintiff might be entitled should be calculated.

The payment of temporary total disability benefits is authorized by N.C. Gen. Stat. § 97-29(a), which provides that, "when an employee qualifies for total disability, the employer shall pay or cause to be paid . . . to the injured employee a weekly compensation equal to sixty-six and two-thirds percent (66 2/3%) of his average weekly wages." For purposes of determining eligibility for workers' compensation benefits, "disability [is] defined . . . [as] the impairment of the injured employee's earning capacity rather than physical disablement." *Russell v. Lowes Prod. Distrib.*, 108 N.C. App. 762, 765, 425 S.E.2d 454, 457 (1993) (citing *Peoples v. Cone Mills Corp.*, 316 N.C. 426, 434, 342 S.E.2d 798, 804 (1986)). "The determination that an employee is disabled is a conclusion of law that must be based upon findings of fact supported by competent evidence." *Teraska v. AT&T*, 174 N.C. App. 735, 739, 622 S.E.2d 145, 148 (2005), *aff'd per curiam*, 350 N.C. 584, 634 S.E.2d 888 (2006) (citing *Hilliard v. Apex Cabinet Co.*, 305 N.C. 593, 595, 290 S.E.2d 682, 684 (1982)). A determination of "disability" requires proof

- (1) that plaintiff was incapable after his injury of earning the same wages he had earned before his injury in the same employment, (2) that plaintiff was incapable after his injury of earning the same wages he had earned before his injury in any other employment, and (3) that this individual's incapacity to earn was caused by plaintiff's injury.

*Hilliard*, 305 N.C. at 595, 290 S.E.2d at 683 (citing *Watkins v. Cent. Motor Lines, Inc.*, 279 N.C. 132, 137, 181 S.E. 2d 588, 592 (1971)). A plaintiff may satisfy the first two prongs of the *Hilliard* test through

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(1) the production of medical evidence that he is physically or mentally, as a consequence of the work related injury, incapable of work in any employment; (2) the production of evidence that he is capable of some work, but that he has, after a reasonable effort on his part, been unsuccessful in his effort to obtain employment; (3) the production of evidence that he is capable of some work but that it would be futile because of preexisting conditions, i.e., age, inexperience, lack of education, to seek other employment; or (4) the production of evidence that he has obtained other employment at a wage less than that earned prior to the injury.

*Russell*, 108 N.C. App. at 765, 425 S.E.2d at 457 (citations omitted).

The record establishes that the Commission concluded that Plaintiff was totally disabled and entitled to temporary total disability payments from and after 15 March 2010. According to the Commission, “plaintiff has been unable to earn the same or greater wages as he was earning in the same or any other employment from March 15, 2010” to the present “[a]s a direct and proximate result of plaintiff’s compensable injuries by accident to his right foot on March 12, 2008, and right knee on May 20, 2009.” In other words, the Commission determined that Plaintiff was disabled from and after 15 March 2010 as a result of both the 12 March 2008 foot injury, with which a \$672.98 weekly compensation rate is associated, and the 20 May 2009 knee injury, with which a \$634.28 weekly compensation rate is associated. Having made the determination that Plaintiff was disabled as the result of the effects of two separate compensable injuries, the Commission was then required to determine the amount of the temporary total disability payment which Plaintiff was entitled to receive, a determination which required the Commission to act on the basis of a proper interpretation of N.C. Gen. Stat. § 97-34.

“The principal goal of statutory construction is to accomplish the legislative intent.” *Lenox, Inc. v. Tolson*, 353 N.C. 659, 664, 548 S.E.2d 513, 517 (2001) (citing *Polaroid Corp. v. Offerman*, 349 N.C. 290, 297, 507 S.E.2d 284, 290 (1998), *cert. denied*, 526 U.S. 1098, 119 S. Ct. 1576, 1432 L. Ed. 2d 679 (1999)). “The best indicia of that intent are the language of the statute . . . , the spirit of the act and what the act seeks to accomplish.” *Coastal Ready-Mix Concrete Co. v. Board of Commissioners*, 299 N.C. 620, 629, 265 S.E.2d 379, 385 (1980). “When the language of a statute is clear and unambiguous, it must be given effect and its clear meaning may not be evaded by an administrative

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body or a court under the guise of construction.” *State ex rel. Utilities Comm. v. Edmisten*, 291 N.C. 451, 465, 232 S.E.2d 184, 192 (1977) (citing *Peele v. Finch*, 284 N.C. 375, 382, 200 S.E.2d 635, 640 (1973)). We will now utilize these principles of statutory construction in order to determine whether the Commission properly determined the rate of compensation to which Plaintiff was entitled from and after 15 March 2010.

According to N.C. Gen. Stat. § 97-34:

If an employee receives an injury for which compensation is payable, while he is still receiving or entitled to compensation for a previous injury in the same employment, he shall not at the same time be entitled to compensation for both injuries . . . but he shall be entitled to compensation for that injury and from the time of that injury which will cover the longest period and the largest amount.

The obvious purpose of N.C. Gen. Stat. § 97-34 is to prevent an injured employee from obtaining double recovery by prohibiting the making of multiple compensation payments that would otherwise be associated with overlapping periods of disability. *Farley v. N.C. Dep’t of Labor*, 146 N.C. App. 584, 588, 553 S.E.2d 231, 234 (2001); *see also Smith v. American & Efird Mills*, 51 N.C. App. 480, 490, 277 S.E.2d 83, 89-90 (1981) (stating that, “[h]ad the period for the partial disability award overlapped the period for the total award, a different result would be required because the stacking of total benefits on top of partial benefits, for the same time period, would allow plaintiff a greater recovery than the legislature intended”), *modified and aff’d*, 305 N.C. 507, 290 S.E.2d 634 (1982). In order to achieve that goal, the General Assembly adopted a formula for determining which of two potentially applicable compensation rates should apply in instances when a claimant was entitled to receive disability payments stemming from multiple injuries by accident. According to that formula, when read in accordance with the plain language of N.C. Gen. Stat. § 97-34, the Commission was required to determine (1) if Plaintiff had received an injury for which compensation was payable while still receiving or entitled to receive compensation for a previous injury and, if so, (2) which of the two rates of compensation to which Plaintiff was entitled would result in payment for the longest time

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and in the largest amount.<sup>4</sup> After making these two determinations, the Commission is required to award Plaintiff the amount of compensation which “will cover the longest period and the largest amount payable under [the] Article.” N.C. Gen. Stat. § 97-34.<sup>5</sup>

Although both parties concede that N.C. Gen. Stat. § 97-34 is relevant to a proper determination of the amount of compensation which Plaintiff should be awarded, the Commission made no reference to that statutory provision in its order. Instead, the Commission simply concluded that, “[a]s a direct and proximate result of [his] compensable injuries by accident to his right foot on March 12, 2008, and right knee on May 20, 2009, [P]laintiff has been unable to earn the same or greater wages as he was earning in the same or any other employment from March 15, 2010, and continuing,” and that “[P]laintiff is entitled to receive temporary total disability compensation at the rate of \$634.28 per week, continuing until further Order of the Industrial Commission.” Thus, the Commission never determined whether Plaintiff had “receive[d] an injury for which compensation [was] payable” while “still receiving or [being] entitled to compensation for a previous injury in the same employment” or, if so, which of the applicable compensation rates would “cover the longest period and [provide] the largest amount payable under [the] Article.” N.C. Gen. Stat. § 97-34. Instead, the Commission simply determined that Plaintiff was disabled as a result of the 12 March 2008 right foot injury and the 20 May 2009 right knee injury, considered collectively, and was entitled to temporary total disability compensation at the lower rate deemed appropriate for the latter of the two injuries without any explanation for its decision to select the rate associated with the 20 May 2009 injury rather than the rate associated with the 12 March 2008 injury. As a result, although it is clear to us that the Commission determined that Plaintiff’s post-15 March 2010 disability stemmed from both the 12 March 2008 and 20 May 2009 injuries, we are simply unable to determine from the relevant portions of the Commission’s

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4. Although the parties have significant disagreements about many issues in this case, they both equate the expression “injury for which compensation is payable” as used in N.C. Gen. Stat. § 97-34 as synonymous with the term “disability.” As a result, we will treat the terms in question as synonymous as well.

5. The literal language of N.C. Gen. Stat. § 97-34 would be implicated by both total and partial disability payments. However, since no partial disability payment to which Plaintiff might be entitled as a result of the 12 March 2008 injury would exceed the temporary total disability payment which the Commission awarded to Plaintiff in this case, any reference to disability payments throughout the remainder of this opinion should be understood as a reference to temporary total disability payments.



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order whether it believed that the 20 May 2009 injury occurred while Plaintiff was “still receiving or entitled to compensation for a previous injury in the same employment” or whether it made a conscious decision, based upon a correct application of N.C. Gen. Stat. § 97-34, as to whether the weekly disability compensation rate applicable to the 12 March 2008 or 20 May 2009 injuries should be awarded in light of Plaintiff’s post-15 March 2010 disability. As a result, since the Commission appears to have decided this case without considering the potential relevance of N.C. Gen. Stat. § 97-34 and since the Commission’s findings are insufficient to permit a proper application of the formula prescribed in N.C. Gen. Stat. § 97-34 to the facts of this case, we are compelled to reverse the Commission’s decision and to remand this case to the Commission for further proceedings not inconsistent with this opinion, including the entry of an order containing the findings and conclusions necessary to properly apply the relevant statutory formula.

In his brief, Plaintiff argues that we should “remand this case to the Commission with instructions to award disability compensation at all times after March 15, 2010, measured by his average weekly wage of \$1,009.42 from his third injury that occurred on March 12, 2008.” In support of this contention, Plaintiff consistently argues that he had “satisfied the second [and third] method[s] of proving disability under *Russell* due to the third injury” during the relevant periods of time since 15 March 2010 given that Plaintiff was subject to continued medically imposed work restrictions during that period and given that Plaintiff either made a reasonable effort to find work or was unable to find work as a result of the combined effect of all of the restrictions to which he was subject. Defendants, on the other hand, argue that the effect of the Commission’s decision is a determination that Plaintiff was temporarily and totally disabled after 15 March 2010 due to the 20 May 2009 injury, that the record supports a determination that Plaintiff was totally disabled after 15 March 2010 as a result of the 20 May 2009 injury, and that the record did not support a determination that Plaintiff was totally disabled after 15 March 2010 solely due to the 12 March 2008 injury. The fundamental problem with the contentions advanced by both parties is that the Commission never made sufficient factual findings to permit us to adequately evaluate the validity of either argument.

On the one hand, although the Commission determined that “[P]laintiff has been temporarily and partially disabled from March 12, 2008, through March 15, 2010” “as a direct and proximate result of

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[P]laintiff's compensable right foot injury on March 12, 2008," and that "[P]laintiff has been unable to earn the same or greater wages as he was earning in the same or any other employment from March 15, 2010, and continuing," the Commission never directly addressed whether Plaintiff continued to be either partially or totally disabled as a result of the 12 March 2008 right foot injury, considered separately from the 20 May 2009 knee injury, after 15 March 2010. Simply put, the fact that the Commission found that Plaintiff was still subject to work-related restrictions stemming from the 12 March 2008 injury, that Plaintiff made a reasonable search for alternative employment after 15 March 2010, and that Plaintiff had been medically restricted from working after 29 September 2010 does not, without more, suffice to support a determination that Plaintiff was entitled to receive temporary total disability benefits from and after 15 March 2010 as a result of the 12 March 2008 injury. On the other hand, we are equally unwilling to treat a conclusion that Plaintiff was only entitled to compensation at the rate associated with the 20 May 2009 injury from and after 15 March 2010 as a determination that Plaintiff was not entitled to receive temporary total disability benefits as a result of the 12 March 2008 injury from and after 15 March 2010 given the Commission's failure to explicitly address the impact of the 12 March 2008 and 20 May 2009 injuries, taken separately rather than in conjunction with each other, upon Plaintiff's eligibility for disability benefits on or after 15 March 2010. In addition, we are unwilling to hold that the record does not support a determination that Plaintiff was entitled to receive temporary total disability benefits as a result of the 12 March 2008 injury from and after 15 March 2010 given the fact that the Commission's findings were apparently made without taking the formula prescribed by N.C. Gen. Stat. § 97-34 into account. As a result, none of the arguments advanced by either Plaintiff or Defendants persuade us to simply affirm the Commission's decision or to reverse that decision with instructions to enter a new order requiring the payment of temporary total disability benefits at the rate associated with the 12 March 2008 injury.

### III. Conclusion

Thus, for the reasons set forth above, we hold that the Commission, as a result of its misapprehension of the applicable law, failed to make sufficient findings of fact to permit us to determine whether the Commission awarded the correct amount of compensation to Plaintiff from and after 15 March 2010. As a result, this case should be, and hereby is, remanded to the Commission for the pur-

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pose of conducting further proceedings not inconsistent with this opinion, including the entry of a new opinion and award containing sufficient findings of fact and conclusions of law to permit a proper application of the legal principles enunciated in N.C. Gen. Stat. § 97-34 to the facts of this case.

REVERSED AND REMANDED.

Judges McGEE and STEELMAN concur.

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IN THE MATTER OF APPEAL OF PARKDALE MILLS AND PARKDALE AMERICA,  
FROM THE DECISIONS OF THE DAVIDSON COUNTY BOARD OF EQUALIZATION AND REVIEW  
CONCERNING THE VALUATION OF CERTAIN REAL PROPERTY FOR TAX YEAR 2007

No. COA 12-1078

Filed 5 March 2013

**Taxation—ad valorem property tax—arbitrary and capricious decision**

The North Carolina Property Tax Commission erred by upholding Davidson County's 2007 *ad valorem* property tax valuation of two textile mills. The Commission's decision remained arbitrary and capricious and did not contain a reasoned analysis. The case was again remanded to the Commission for further findings of fact and conclusions of law.

Appeal by taxpayer from final decision on remand entered 23 May 2012 by the North Carolina Property Tax Commission. Heard in the Court of Appeals 10 January 2013.

*Parker Poe Adams & Bernstein LLP, by Charles C. Meeker and Jamie S. Schwedler, for respondent.*

*Bell, Davis & Pitt, P.A., by John A. Cocklereece, Jr., D. Anderson Carmen, and Justin M. Hardy, for taxpayer.*

HUNTER, JR., Robert, N., Judge.

Parkdale America, LLC ("Parkdale") appeals from the Final Decision on Remand of the North Carolina Property Tax Commission ("the Commission") upholding Davidson County's (the "County") 2007 *ad valorem* property tax valuation of two textile mills located in

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Lexington and Thomasville. Parkdale alleges, *inter alia*, that the Commission erred in re-affirming the County's valuation because the Commission did not follow this Court's instructions in *In re Parkdale Am.*, \_\_\_ N.C. App. \_\_\_, \_\_\_, 710 S.E.2d 449, 453 (2011) ("*Parkdale I*"). We agree with Parkdale that the Commission's decision remains arbitrary and capricious and does not contain a "reasoned analysis." Therefore, we again remand to the Commission for further findings of fact and conclusions of law consistent with this opinion.<sup>1</sup>

**I. Factual and Procedural Background**

In our previous consideration of this case, we noted that the County assessed the 1 January 2007 tax value of Parkdale's Lexington plant at \$6,776,160 and its Thomasville plant at \$3,620,080. *See Parkdale I*, \_\_\_ N.C. App. at \_\_\_, 710 S.E.2d at 450. Parkdale appealed both valuations to the Davidson County Board of Equalization and Review (the "Review Board"). The Review Board subsequently reduced the appraised value to \$5,040,429 for the Lexington plant and \$3,287,150 for the Thomasville plant. *Id.* Parkdale contended before the Review Board that the true value of the Lexington plant was \$906,000 and the true value of the Thomasville plant was \$625,000. *Id.*

After the hearing, the Commission determined that "the County had met its burden with regard to the assessments of the Lexington and Thomasville manufacturing facilities" and affirmed the appraised values established by the Review Board. *Id.* Parkdale then appealed the Commission's ruling to this Court. *Id.*

In *Parkdale I*, this Court held that the Commission had improperly applied the requisite burden-shifting framework. *See id.* at \_\_\_, 710 S.E.2d at 451 (citing *In re IBM Credit Corp.*, 201 N.C. App. 343, 345, 689 S.E.2d 487, 489 (2009) ("*IBM Credit II*"). This Court then vacated the Commission's decision and remanded with specific instructions that it "*shall* make specific findings of fact and conclusions of law explaining how it weighed the evidence to reach its conclusions using the burden-shifting framework articulated above and in this Court's previous decisions." *Id.* at \_\_\_, 710 S.E.2d at 453 (emphasis in original).

The Commission entered its Final Decision on Remand on 23 May 2012, and Parkdale timely appealed.

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1. As a result, we do not address any of Parkdale's other arguments.

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**II. Jurisdiction & Standard of Review**

We have jurisdiction over Parkdale's appeal of right. *See* N.C. Gen. Stat. § 7A–29 (2011) (stating a party has an appeal of right from any final order of the Property Tax Commission); N.C. Gen. Stat. § 105–345(d) (2011) (stating an appeal shall be to this Court).

When reviewing decisions of the Commission, this Court

may affirm or reverse the decision of the Commission, declare the same null and void, or remand the case for further proceedings; or it may reverse or modify the decision if the substantial rights of the appellants have been prejudiced because the Commission's findings, inferences, conclusions or decisions are:

- (1) In violation of constitutional provisions; or
- (2) In excess of statutory authority or jurisdiction of the Commission; or
- (3) Made upon unlawful proceedings; or
- (4) Affected by other errors of law; or
- (5) Unsupported by competent, material and substantial evidence in view of the entire record as submitted; or
- (6) Arbitrary or capricious.

N.C. Gen. Stat. § 105–345.2(b) (2011).

Our Supreme Court has noted, “[a]n act is arbitrary when it is done without adequate determining principle.” *In re Hous. Auth. of City of Salisbury, Project NC-16-2*, 235 N.C. 463, 468, 70 S.E.2d 500, 503 (1952). Moreover, an act is capricious “when it is done without reason, in a whimsical manner, implying either a lack of understanding of or a disregard for the surrounding facts and settled controlling principles.” *Id.* In short, when these terms are applied to discretionary acts, such as the determinations of the Commission, “they ordinarily denote abuse of discretion, though they do not signify nor necessarily imply bad faith.” *Id.* “Determination of whether conduct is arbitrary and capricious or an abuse of discretion is a conclusion of law.” *Transcon. Gas Pipe Line Corp. v. Calco Enters.*, 132 N.C. App. 237, 244, 511 S.E.2d 671, 677 (1999) (citing *Dept. of Trans. v. Overton*, 111 N.C. App. 857, 861, 433 S.E.2d 471, 474 (1993)).

We review Commission decisions under the whole record test to “‘determine whether an administrative decision has a rational basis

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in the evidence.’ ” *In re McElwee*, 304 N.C. 68, 87, 283 S.E.2d 115, 127 (1981) (quoting *In re Rogers*, 297 N.C. 48, 65, 253 S.E.2d 912, 922 (1979)).

The “whole record” test does not allow the reviewing court to replace the [Commission’s] judgment as between two reasonably conflicting views, even though the court could justifiably have reached a different result had the matter been before it *de novo*. On the other hand, the “whole record” rule requires the court, in determining the substantiality of evidence supporting the [Commission’s] decision, to take into account whatever in the record fairly detracts from the weight of the [Commission’s] evidence. Under the whole evidence rule, the court may not consider the evidence which in and of itself justifies the [Commission’s] result, without taking into account contradictory evidence or evidence from which conflicting inferences could be drawn.

*Id.* at 87-88, 283 S.E.2d at 127 (quotation marks and citations omitted). However, this Court cannot reweigh the evidence presented and substitute its evaluation for the Commission’s. *In re AMP*, 287 N.C. 547, 562, 215 S.E.2d 752, 761 (1975). “If the Commission’s decision, considered in the light of the foregoing rules, is supported by *substantial evidence*, it cannot be overturned.” *In re Philip Morris U.S.A.*, 130 N.C. App. 529, 533, 503 S.E.2d 679, 682 (1998) (emphasis added).

### III. Analysis

Our opinion in *Parkdale I* thoroughly described the burden-shifting framework the Commission is required to apply. *See Parkdale I*, \_\_\_ N.C. App. at \_\_\_, 710 S.E.2d at 451. A county’s *ad valorem* tax assessment is presumptively correct. *See IBM Credit II*, 201 N.C. App. at 345, 689 S.E.2d at 489 (2009) (citing *In re AMP*, 287 N.C. at 562, 215 S.E.2d at 761). However, the taxpayer may rebut this presumption by presenting “competent, material[,] and substantial evidence that tends to show that (1) [e]ither the county tax supervisor used an arbitrary method of valuation; or (2) the county tax supervisor used an illegal method of valuation; and (3) the assessment substantially exceeded the true value in money of the property.” *Id.* (quoting *In re AMP*, 287 N.C. at 563, 215 S.E.2d at 762) (second alteration in original) (quotation marks omitted). “Simply stated, it is not enough for the taxpayer to show that the means adopted by the tax supervisor were wrong, he must also show that the result arrived at is *substantially* greater than the true value in money of the property

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assessed, i.e., that the valuation was *unreasonably* high.” *In re AMP*, 287 N.C. at 563, 215 S.E.2d at 762 (citing *Albemarle Elec. Membership Corp. v. Alexander*, 282 N.C. 402, 410, 192 S.E.2d 811, 816-17 (1972)).

Once the taxpayer rebuts the initial presumption, the burden shifts back to the County which must then demonstrate that its methods produce true values. *See IBM Credit II*, 201 N.C. App. at 345, 689 S.E.2d at 489 (citing *In re S. Ry.*, 313 N.C. 177, 182, 328 S.E.2d 235, 239 (1985)). The critical inquiry in such instances is whether the County’s appraisal methodology “is the proper means or methodology given the characteristics of the property under appraisal to produce a true value or fair market value.” *Id.* at 349, 689 S.E.2d at 491 (internal quotation marks omitted). To determine the appropriate appraisal methodology under the given circumstances, the Commission must “hear the evidence of both sides, to determine its weight and sufficiency and the credibility of witnesses, to draw inferences, and to appraise conflicting and circumstantial evidence, all in order to determine whether the Department met its burden.” *Id.* (quoting *In re S. Ry.*, 313 N.C. at 182, 328 S.E.2d at 239).

In the initial appeal of the present case, Parkdale contended, as it contends now, that the County’s appraisal methodology was arbitrary and capricious. *See Parkdale I*, \_\_\_ N.C. App. at \_\_\_, 710 S.E.2d at 451. This Court did not see then, and does not see now, how the Commission’s acceptance of the County’s valuation without further appraisal of conflicting evidence (as required by *IBM Credit II*) is anything but arbitrary or capricious; the Commission’s decision appears to be wholly discretionary and not based on the requisite determining principles. *See In re Hous. Auth. of City of Salisbury, Project NC-16-2*, 235 N.C. at 468, 70 S.E.2d at 503.

This Court remanded the Commission’s initial decision in part because of the Commission’s enigmatic application of the aforementioned burden-shifting framework. Curiously, the Commission concluded “that *the County met its burden* with regard to the assessments of the Lexington and Thomasville manufacturing facilities.” *Parkdale I*, \_\_\_ N.C. App. at \_\_\_, 710 S.E.2d at 452 (emphasis added). This is puzzling because ordinarily the County bears no burden, as the County’s tax assessment is presumptively correct. *See In re AMP*, 287 N.C. at 562, 215 S.E.2d at 761. Thus, following the burden-shifting scheme, in order for the County to have any sort of burden to meet, Parkdale must have shifted the burden to the County by successfully rebutting the presumptive validity of the County’s *ad valorem* tax assessment. *See Parkdale I*, \_\_\_ N.C. App. at \_\_\_, 710 S.E.2d at 452-53.

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Parkdale may have rebutted the presumptive validity of the *ad valorem* tax assessment (and thereby shifted the burden to the County) by showing that the County's valuation was either (1) arbitrary or (2) illegal; *and* that this valuation was (3) substantially higher than the true value of the property. *See In re AMP*, 287 N.C. at 563, 215 S.E.2d at 762. Problematically, the Commission's initial decision made no explicit mention by findings of fact or conclusions of law to show precisely how Parkdale shifted the burden to the County. *See Parkdale I*, \_\_\_ N.C. App. at \_\_\_, 710 S.E.2d at 453. Even more concerning is that the Commission's initial decision did not explain the process by which the County carried its newly applied burden to demonstrate that the County's valuation (and not Parkdale's) was correct. *Id.*

Lacking both an explanation for the burden shifting and justification for the decision in favor of the County, this Court could not place faith in the Commission's ultimate finding nor adequately apply the standard of review. *Id.* As such, we vacated and remanded the case to the Commission with an expectation that they would conduct additional hearings as necessary. *Id.* This Court also explicitly instructed that the Commission "*shall* make specific findings of fact and conclusions of law explaining how it weighed the evidence to reach its conclusions using the burden-shifting framework articulated above and in this Court's previous decisions." *Id.* (emphasis in original).

On remand, the Commission did not conduct additional hearings. The Commission did, however, make additional conclusions of law. In the Commission's Final Decision on Remand, the Commission clarified that the testimony of Mr. Carter, Parkdale's appraiser, "tends to show that the County Board used an arbitrary method . . . and that the assessments of the Lexington and Thomasville plants substantially exceeded true value." This finding adequately explains why the burden was shifted to the County. *See In re AMP*, 287 N.C. at 563, 215 S.E.2d at 762. However, the Commission still fails in its Final Decision on Remand to adequately explain how the County met this newly applied burden.

The Commission's Final Decision on Remand presents three rationales by which the County has purportedly carried its burden: (1) the incomparability of the value of other plants Mr. Carter used in his appraisal, (2) the comparability of plants that the County used in its appraisal, and (3) Davidson County's Schedule of Values. Upon examination, each of these rationales fails.



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First, the Commission notes that Mr. Carter's appraisals relied on plants that were closed or otherwise not comparable to the Parkdale plants. However, the alleged dissimilarity of the plants considered in Mr. Carter's appraisal was only relevant when the burden belonged to Parkdale; the inadequacy of Mr. Carter's appraisal is not material once the burden shifted to the County. If Mr. Carter's appraisals were in fact unreliable, the burden should never have been shifted onto the County in the first instance.

Second, the Commission relies on the County's comparable sales method without fully explaining how the properties examined are particularly comparable to Parkdale's plants. Although potentially relevant, the details about these "more comparable" properties, and specifics regarding the possibility of adaptive reuse of Parkdale's plants, are substantially lacking. Moreover, because the Commission undertook no additional hearings or fact-finding ventures, these comparable sales findings were necessarily part of the record when the Commission first ruled that Parkdale had carried its burden. Thus, if such findings were not substantial enough to prevent Parkdale from carrying its burden, they should not be determinative now that the burden rests on the County.

Third, the application of Davidson County's Schedule of Values likewise fails to carry its burden here. Indeed, these were the same values the Commission rejected as "arbitrary" and "substantially exceed[ing] true value" when it shifted the burden from Parkdale to the County. Accordingly, because the Commission shifted the burden to the County, the County must adequately demonstrate why these once "arbitrary" and excessive values should now be deemed appropriate. See *In re S. Ry. Co.*, 313 N.C. at 182, 328 S.E.2d at 239; *IBM Credit II*, 201 N.C. App. at 345, 689 S.E.2d at 489 (noting that, once the burden has been shifted, the County must prove its valuation methods will indeed produce the property's "true value").

The Commission's new findings do nothing to alleviate this Court's lack of confidence that the County has, in fact, carried its burden. In order to prevail, the County must "demonstrate to the Property Tax Commission that the values determined in the revaluation process were not substantially higher than that called for by the statutory formula, and the county must demonstrate the reasonableness of its valuation 'by competent, material and substantial evidence[.]'" *In re McElwee*, 304 N.C. at 86-87, 283 S.E.2d at 126 (quoting N.C. Gen. Stat. § 105-345.2(b)(5)). Although the Commission's Final

## IN RE APPEAL OF PARKDALE MILLS

[225 N.C. App. 713 (2013)]

Decision on Remand declares that the County has presented “competent, material, and substantial evidence” necessary to carry its burden, we hold that it has not. The Final Decision on Remand merely establishes that the Commission initially found the County’s assessed value to be “arbitrary” and substantially above the market value of the property.

The dictate of *ad valorem* taxes is that the value of the property is the price at which the property would likely change hands between a willing buyer and equally willing seller. *See* N.C. Gen. Stat. § 105-283 (2011). By emphasizing the fact that Parkdale uses these facilities industrially to produce yarn 24-hours a day, the Commission’s findings implicitly allow the County to measure the value of the properties as their subjective worth to Parkdale. Such a valuation is obviously not the same as adequately determining the objective value of these properties to another willing buyer. *Cf. In re AMP*, 287 N.C. at 568, 215 S.E.2d at 765.

Although we make no finding on appeal here regarding the true value of the property, this Court is troubled by the substantial discrepancy between Parkdale’s assessed value and the County’s assessed value. On remand, the Commission shall conduct additional hearings as necessary and make further findings of fact and conclusions of law in order to reconcile this discrepancy. If the County cannot carry its assigned burden, or if the Commission again fails to rectify the inadequacies of its Final Decision, this Court may exercise its prerogative to remand for yet a third time with specific instructions for the Commission to adopt Parkdale’s valuation of the property as, unlike the County’s valuation, it has not been held to be “arbitrary.” *See In re IBM Credit Corp.*, \_\_\_ N.C. App. \_\_\_, \_\_\_, 731 S.E.2d 444, 444-45 (2012) (reversing the third final decision of the Commission and remanding with instructions that the Commission enter a decision adopting the value listed by the taxpayer, “due to the failure of the County to meet its burden”).

VACATED AND REMANDED.

Judges STROUD and DAVIS concur.

**INLAND HARBOR HOMEOWNERS ASS'N v. ST. JOSEPHS MARINA, LLC**

[225 N.C. App. 721 (2013)]

INLAND HARBOR HOMEOWNERS ASSOCIATION, INC., PLAINTIFF

v.

ST. JOSEPHS MARINA, LLC, RENAISSANCE HOLDINGS, LLC, ST. JOSEPHS PARTNERS, LLC, DEWITT REAL ESTATE SERVICES, INC., DENNIS BARBOUR, RANDY GAINEY, THOMAS A. SAEED, JR., TODD A. SAEED, ROBERT D. JONES, AND THE NORTH CAROLINA COASTAL RESOURCES COMMISSION, DEFENDANTS

No. COA11-715-3

Filed 5 March 2013

**Deeds—judicial reformation—mutual mistake—clear, cogent, and convincing evidence**

The trial court did not err in a judicial reformation of a deed case by granting summary judgment in favor of defendants. Plaintiff failed to show a mutual mistake of the parties by clear, cogent, and convincing evidence.

Appeal by plaintiff from order entered 12 October 2010 by Judge W. Allen Cobb, Jr. in New Hanover County Superior Court. Heard in the Court of Appeals 9 November 2011.

*Clark, Newton & Evans, P.A., by Don T. Evans, Jr. and Seth P. Buskirk, for plaintiff-appellant.*

*Marshall, Williams & Gorham, LLP, by John. L. Coble and Williams Mullen, by Gilbert C. Laite, III and Kelly Colquette Hanley, for defendants-appellees.*

STEELMAN, Judge.

**I. Procedural History**

This case was initially heard in the Court of Appeals on 9 November 2011, upon the appeal of plaintiff-appellant from the order of the trial court, entered 12 October 2010, which dismissed with prejudice plaintiff's first, second, third, fifth, and seventh causes of action. Subsequent to the entry of the trial court's order, plaintiff dismissed, without prejudice, its remaining claims. On 6 March 2012 the Court of Appeals filed an opinion affirming the decision of the trial court. *Inland Harbor Homeowners Ass'n, Inc. v. St. Josephs Marina, LLC*, \_\_\_ N.C. App. \_\_\_, 724 S.E.2d 92 (2012) (*Inland Harbor I*).

On 13 June 2012 the Supreme Court of North Carolina entered an order allowing discretionary review for the limited purpose of remanding the case to the Court of Appeals for consideration of

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whether the trial court properly granted defendants' motion for summary judgment. On 4 September 2012 the Court of Appeals filed a second opinion in this matter, again affirming the trial court's granting of summary judgment for defendants. *Inland Harbor Homeowners Ass'n, Inc. v. St. Josephs Marina, LLC*, \_\_\_ N.C. App. \_\_\_, 731 S.E.2d 704 (2012) (*Inland Harbor II*). On 12 December 2012 the Supreme Court of North Carolina entered an order allowing discretionary review for the limited purpose of remanding the case to the Court of Appeals for consideration of the issue of whether

The Trial Court erred in denying appellant's [plaintiff's] motion for summary judgment on appellant's claim for judicial reformation of the deed, and in granting appellee's motion on the same issue[.]

The Supreme Court noted that in its petition for discretionary review to the North Carolina Supreme Court, petitioner had restated its third issue as follows:

Whether genuine issues of material fact exist precluding summary judgment for Appellee-Respondents on Plaintiff-Petitioner's. . . deed reformation claim.

The order of the Supreme Court of North Carolina further stated that the Court of Appeals failed to address this issue in its second opinion.

## II. Factual Background

The factual background of this case has been set forth in detail in the prior two opinions of this Court. Those recitations are hereby incorporated into this opinion by reference as if fully set forth herein.

### III. Trial Court's Denial of Plaintiff's Motion for Summary Judgment on its Claims for Judicial Reformation of the Deed

In its fifth cause of action stated in its First Amended and Restated Complaint, plaintiff asserted that there were errors contained in deeds as "the result of a mutual mistake." Plaintiff further alleged that it was "entitled to judicial reformation of the deeds which were the subject of the Exchange Agreement to conform to the intention of the parties as depicted in the Michael Underwood map. . ."

On 27 August 2010, plaintiff moved for partial summary judgment on its fifth and seventh causes of action. On 23 September 2010, defendants moved for partial summary judgment on plaintiff's first,

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second, third, fifth, and seventh causes of action. On 12 October 2010, the trial court granted defendants' motion for summary judgment on plaintiff's first, second, third, fifth, and seventh causes of action, and denied plaintiff's motion for summary judgment as to plaintiff's fifth and seventh causes of action.

On appeal to the Court of Appeals, plaintiff presented three issues. The third issue presented was "[w]hether the Trial Court erred in denying Appellant's Motion for Summary Judgment on Appellant's claim for judicial reformation of the Deed, and in granting Appellee's motion on the same issue."

In the opinion filed on 6 March 2012, the Court of Appeals addressed this issue as follows:

Finally, Plaintiff argues that the trial court erred by denying Plaintiff's motion for summary judgment on Plaintiff's claim for judicial reformation. We disagree.

"Where a deed fails to express the true intention of the parties, and that failure is due to the mutual mistake of the parties, or to the mistake of one party induced by fraud of the other, or to the mistake of the draftsman, the deed may be reformed to express the parties' true intent." *Durham v. Creech*, 32 N.C. App. 55, 58-59, 231 S.E.2d 163, 166 (1977). When a party asserts mutual mistake as the basis for judicial reformation, "[t]he evidence presented to prove mutual mistake must be clear, cogent and convincing, and the question of reformation on that basis is a matter to be determined by the fact finder." *Smith v. First Choice Servs.*, 158 N.C. App. 244, 250, 580 S.E.2d 743, 748 (2003). "[B]ecause mutual mistake is one that is common to *all the parties to a written instrument*, the party raising the defense must state with particularity the circumstances constituting mistake as to all of the parties to the written instrument." *Van Keuren v. Little*, 165 N.C. App. 244, 247, 598 S.E.2d 168, 170 (2004) (internal quotation marks and citation omitted).

In preparation for litigation about the ownership of the bulkhead, Plaintiff discovered that it mistakenly conveyed property to Partners in the 2004 exchange of parcels. In support of its claim of mutual mistake, Plaintiff failed to offer clear, cogent, and convincing evi-

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dence of Partners' mistake. Plaintiff's affidavit from its attorney proves that it was aware at the time of the exchange that the vesting deed and the surveyor's description gave different descriptions, but both descriptions purported to convey Plaintiff's .28 acres. Plaintiff relied on the description in the vesting deed and unfortunately, Plaintiff gave more than the .28 acres that it contemplated at the time of the exchange. Although convincing evidence of Plaintiff's mistaken belief, Plaintiff's evidence fails to establish clear, cogent, and convincing evidence of Partners' mistaken belief at the time of the exchange. Accordingly, Plaintiff's final argument is overruled.

*Inland Harbor I*, \_\_\_ N.C. App. at \_\_\_, 724 S.E.2d at 97-98.

In the opinion filed on 4 September 2012 the Court of Appeals further addressed this question:

Finally, Plaintiff argues that the trial court erred in granting summary judgment to Defendants on Plaintiff's claim for judicial reformation of the deed based on mutual mistake. It is well-established that "[w]hen a party seeks to reform a contract due to an affirmative defense such as mutual mistake ... the burden of proof lies with the moving party[ ]" to prove mutual mistake by clear, cogent, and convincing evidence. *Smith v. First Choice Servs.*, 158 N.C. App. 244, 250, 580 S.E.2d 743, 749 (2003). In *Inland Harbor I*, we concluded that Plaintiff failed to meet this burden. Because Plaintiff failed to meet its burden of showing a mutual mistake, the trial court did not err in granting summary judgment to Defendants on this issue.

*Inland Harbor II*, \_\_\_ N.C. App. at \_\_\_, 731 S.E.2d at 707.

Plaintiff's brief before the Court of Appeals asserted that a deed from plaintiff to defendants conveyed more land than was intended by plaintiff. Plaintiff then went on to acknowledge two important legal principles applicable to this case: (1) the presumption of correctness of written instruments; and (2) that this presumption can be overcome only by clear, cogent, and convincing evidence of a mutual mistake of the parties. These principles were the basis of the trial court's ruling and the two prior decisions of the Court of Appeals.

## INLAND HARBOR HOMEOWNERS ASS'N v. ST. JOSEPHS MARINA, LLC

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Plaintiff was required to show a mutual mistake, *i.e.* a mistake by *both* parties, by clear, cogent and convincing evidence in order to prevail on its claim for judicial reformation. Upon the cross-motions for summary judgment, plaintiff failed to make such a showing.

In its petition for discretionary review to the Supreme Court of North Carolina, plaintiff contends that this Court failed to properly apply the case of *Hice v. Hi-Mil, Inc.*, 301 N.C. 647, 273 S.E.2d 268 (1981), which plaintiff asserts is controlling precedent. In *Hice*, the case was tried before a judge, sitting without a jury. The trial court found that plaintiff showed a mutual mistake, and ordered reformation of the deed. This judgment was affirmed by both the Court of Appeals and the Supreme Court. The Supreme Court held that the “trial court’s conclusions of law and findings of fact are amply supported by the evidence.” *Id.* at 653, 273 S.E.2d at 272. The case was not decided pursuant to a motion for summary judgment, as was the case currently before this Court. The standards of appellate review are different for a bench trial and a summary judgment order.

In *Hice*, the Supreme Court stated the applicable law to be as follows:

In an action for reformation of a written instrument, the plaintiff has the burden of showing that the terms of the instrument do not represent the original understanding of the parties and must do so by clear, cogent and convincing evidence. *Isley v. Brown*, 253 N.C. 791, 117 S.E.2d 821 (1961); *Insurance Co. v. Lambeth*, 250 N.C. 1, 108 S.E.2d 36 (1959); *Perkins v. Perkins*, 249 N.C. 152, 105 S.E.2d 663 (1958); *Hege v. Sellers*, 241 N.C. 240, 247, 84 S.E.2d 892, 897 (1954); *Coppersmith v. Insurance Co.*, 222 N.C. 14, 21 S.E.2d 838 (1942). Additionally, there is “a *strong presumption* in favor of the correctness of the instrument as written and executed, for it must be assumed that the parties knew what they agreed and have chosen fit and proper words to express that agreement in its entirety.” *Clements v. Insurance Co.*, 155 N.C. 57, 61, 70 S.E. 1076, 1077 (1911) (emphasis added). This presumption is strictly applied when the terms of a deed are involved in order “to maintain the stability of titles and the security of investments.” *Williamson v. Rabon*, 177 N.C. 302, 306, 98 S.E. 830, 832 (1919); *accord*, *Isley v. Brown*, 253 N.C. at 793, 117 S.E.2d at 823.

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*Id.* at 651, 273 S.E.2d at 270.

We can discern no difference in the statement of the applicable legal principles set forth in *Hice* and those set forth in our prior two opinions in this case.

In order to survive a motion for summary judgment in this case, plaintiff was required to show not just a mistake on its own part, but a *mutual mistake* on the part of all parties. This had to be shown by clear, cogent and convincing evidence. Plaintiff failed to make such a showing based on the materials presented to the trial court at the summary judgment hearing.

The trial court correctly determined, based upon the aforementioned legal principles, that there was not a genuine issue of material fact as to plaintiff's fifth cause of action. The dismissal of that claim, pursuant to Rule 56 of the North Carolina Rules of Civil Procedure, is

**AFFIRMED.**

Judges GEER and HUNTER, Robert N., Jr. concur.

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BRENDA HANES REDD, PLAINTIFF

v.

WILCOHESS, L.L.C., AND A.T. WILLIAMS OIL COMPANY, DEFENDANTS

No. COA12-639

Filed 5 March 2013

**1. Premises Liability—negligence—last clear chance—jury instruction—insufficient evidence**

The trial court did not commit reversible error in a negligence case arising out of a slip and fall accident by denying plaintiff's request for a jury instruction on last clear chance. The evidence presented at trial was not sufficient to support a reasonable inference by the jury that defendants' employee had the time and ability to avoid the injury, the third element of the claim.

**2. Premises Liability—negligence—willful and wanton negligence—jury instruction—insufficient evidence**

The trial court did not commit reversible error in a negligence case arising out of a slip and fall accident by denying plaintiff's



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request for a jury instruction on willful and wanton negligence. The evidence presented at trial was not sufficient to support a reasonable inference by the jury that defendants' employee acted with any purpose or deliberation not to discharge his duty to plaintiff's safety or acted with a wicked purpose or manifested a reckless indifference to plaintiff's safety.

**3. Jury—deliberations—request for surveillance video—specific consent of parties not reached**

The trial court did not err in a negligence case arising out of a slip and fall accident by not submitting a surveillance video to the jury in the jury room during deliberations. The parties never reached the requisite level of specific consent with respect to the questions of whether and how the jury would view the surveillance videotapes.

Appeal by Plaintiff from judgment entered 9 September 2011 by Judge Richard W. Stone in Forsyth County Superior Court. Heard in the Court of Appeals 7 January 2013.

*Kennedy, Kennedy, Kennedy and Kennedy, LLP, by Harold L. Kennedy, III, and Harvey L. Kennedy, for Plaintiff.*

*McAngus, Goudelock & Courie, PLLC, by Garry T. Davis and Jeffrey B. Kuykendal, for Defendants.*

DILLON, Judge.

Brenda Hanes Redd (Plaintiff) appeals from a judgment entered 9 September 2011 awarding her nothing to compensate her for her personal injuries sustained in a slip and fall accident allegedly resulting from the negligence of WilcoHess, L.L.C., and A.T. Williams Oil Company (together, Defendants), where the jury found Plaintiff was contributorily negligent. On appeal, Plaintiff contends the trial court erred by denying Plaintiff's requests for jury instructions concerning the issue of last clear chance and the issue of willful and wanton negligence. Plaintiff also contends she "was precluded from receiving a fair trial because of irregularities by the trial court." We find no error.

**I: Factual and Procedural Background**

The evidence of record is conflicting but tends to show as follows: On 7 December 2003, Plaintiff entered Defendants' WilcoHess convenience store located on Silas Creek Parkway in Winston-Salem (the Wilco) to buy a soda. Prior to the time Plaintiff entered the store, Josh

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Fisher (Fisher), a Wilco employee, decided to mop the floor. Plaintiff's evidence showed that a co-worker of Fisher told him that it was too early in the evening to mop because of the steady flow of customers expected during that time. Fisher, however, denies that he was so advised. In any event, Fisher displayed two wet-floor warning signs inside the store—one inside the entranceway and one toward the back—and proceeded to mop. Plaintiff testified that the signs were placed in a way that made them difficult to read.

Upon entering the store, Plaintiff walked to the refrigerator section. Plaintiff gave testimony, which was corroborated by surveillance video<sup>1</sup> evidence, that Fisher saw—or at least looked toward—Plaintiff as she entered the store. Fisher, however, testified that he never saw Plaintiff at any time before she fell.

While Plaintiff was in the refrigerator section, Fisher mopped a section of the floor behind Plaintiff and leading towards the cash register but gave no verbal words of caution to Plaintiff that he was doing so. Plaintiff then walked back toward the cash register, slipped on the wet floor, and fell, sustaining an injury—a herniated disc. Fisher testified, and Plaintiff does not dispute, that he was in a closet at the back of the store emptying the mop bucket with his back turned when Plaintiff fell. Fisher admitted, however, that “it takes about [ten] minutes” for the floor to dry after he mopped it, and the floor of the Wilco was “damp and . . . clean” when Plaintiff walked from the refrigerator to the register. Fisher's co-worker approached Plaintiff to assist her and slipped but did not fall.

On 1 April 2010, Plaintiff filed this action against Defendants.<sup>2</sup> On 21 October 2010, Defendants answered the complaint alleging contributory negligence on the part of Plaintiff, among other defenses. The trial court instructed the jury with respect to the law of contributory negligence but denied Plaintiff's request to instruct the jury concerning last clear chance or willful and wanton negligence. On 18 August 2011, the jury found that Defendants were negligent. However, the jury also found that Plaintiff was contributorily negligent; and therefore, Plaintiff was awarded nothing. From this judgment, Plaintiff appeals.

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1. The store's surveillance video was not transmitted to the Court on appeal.

2. Two previous lawsuits were filed by Plaintiff in this case, the first filed on 28 November 2006 and voluntarily dismissed on 29 October 2007, and the second filed on 27 October 2008 and dismissed without prejudice on 5 October 2009. After the second dismissal, the court allowed Plaintiff six months to re-file.

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**II: Analysis****A: Jury Instructions**

In her brief, Plaintiff presents three issues. Plaintiff's first two arguments pertain to the jury instructions. Specifically, Plaintiff argues that the trial court committed reversible error by denying her requests for an instruction on last clear chance and an instruction on willful and wanton negligence. We find both arguments without merit.

"When reviewing the refusal of a trial court to give certain instructions requested by a party to the jury, this Court must decide whether the evidence presented at trial was sufficient to support a reasonable inference by the jury of the elements of the claim." *Ellison v. Gambill Oil Co.*, 186 N.C. App. 167, 169, 650 S.E.2d 819, 821 (2007) (citations omitted), *aff'd per curiam and disc. review improvidently allowed*, 363 N.C. 364, 677 S.E.2d 452 (2009). "If the instruction is supported by such evidence, the trial court's failure to give the instruction is reversible error." *Id.* "The party asserting error bears the burden of showing that the jury was misled or that the verdict was affected by an omitted instruction." *Hammel v. USF Dugan, Inc.*, 178 N.C. App. 344, 347, 631 S.E.2d 174, 178 (2006) (citations and quotation marks omitted). "Under such a standard of review, it is not enough for the appealing party to show that error occurred in the jury instructions; rather, it must be demonstrated that such error was likely, in light of the entire charge, to mislead the jury." *Id.* Generally, "[a] specific jury instruction should be given when (1) the requested instruction was a correct statement of law and (2) was supported by the evidence, and that (3) the instruction given, considered in its entirety, failed to encompass the substance of the law requested and (4) such failure likely misled the jury." *Outlaw v. Johnson*, 190 N.C. App. 233, 243, 660 S.E.2d 550, 559 (2008) (citation and quotation marks omitted).

**i: Last Clear Chance**

**[1]** In Plaintiff's first argument on appeal, she contends the trial court erred by deciding not to instruct the jury concerning last clear chance. We disagree.

The doctrine of last clear chance "is a plea in avoidance to the affirmative defense of contributory negligence[.]" *Vernon v. Crist*, 291 N.C. 646, 650, 231 S.E.2d 591, 593 (1977). In *Exum v. Boyles*, 272 N.C. 567, 158 S.E.2d 845 (1968), the Court explained the doctrine of last clear chance in the following way:

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[I]t is well established in this State that where the defendant does owe the plaintiff the duty of maintaining a lookout and, had he done so, could have discovered the plaintiff's helpless peril in time to avoid injuring him by then exercising reasonable care, the doctrine of the last clear chance does impose liability if the defendant failed to take such action to avoid the injury. This is in accord with . . . the majority view in other American jurisdictions.

*Id.* at 576, 158 S.E.2d at 853 (citations omitted). In order to invoke the doctrine of last clear chance, an injured Plaintiff must establish the following elements:

- 1) The plaintiff, by her own negligence put herself into a position of helpless peril;
- 2) Defendant discovered, or should have discovered, the position of the plaintiff;
- 3) Defendant had the time and ability to avoid the injury;
- 4) Defendant negligently failed to do so; and
- 5) Plaintiff was injured as a result of the defendant's failure to avoid the injury.

*Kenan v. Bass*, 132 N.C. App. 30, 33, 511 S.E.2d 6, 7-8 (1999) (citation and quotation marks omitted). The failure of a trial court to submit the issue of last clear chance to the jury when the elements of the doctrine are supported by substantial evidence is error and requires a new trial. *Womack v. Stephens*, 144 N.C. App. 57, 68, 550 S.E.2d 18, 25 (2001), *disc. review denied*, 354 N.C. 229, 555 S.E.2d 277 (2001).

On the specific facts of this case, we do not believe the evidence presented at trial was sufficient to support a reasonable inference by the jury of the elements of last clear chance. Even assuming *arguendo* the other elements have been established, the evidence does not support a reasonable inference as to the third element that Defendants must have had "the time and ability to avoid the injury[.]" *Bass*, 132 N.C. App. at 33, 511 S.E.2d at 7-8. We believe in this case that Plaintiff's "helpless peril" began the moment Plaintiff started slipping on the wet floor. Before she began to slip, her situation was "not one of true helplessness[.]" *Nealy v. Green*, 139 N.C. App. 500, 505, 534 S.E.2d 240, 244 (2000) (holding that "[t]he situation is not one

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of true helplessness, as the injured party is in a position to escape[;] [r]ather, the negligence consists of failure to pay attention to one's surroundings and discover his own peril"). Up to the point she began to slip, Plaintiff had the opportunity to discover her peril. At the moment of Plaintiff's helpless peril, when she began to slip, the evidence shows that Fisher was "in the back" of the store, emptying out the mop bucket with his back turned to Plaintiff. Therefore, the evidence does not support a reasonable inference that Fisher had "the time and ability to avoid the injury[.]" *Bass*, 132 N.C. App. at 33, 511 S.E.2d at 7-8. Based on the foregoing, we conclude the trial court did not err in denying Plaintiff's request for a jury instruction concerning the issue of last clear chance.

## ii: Willful and Wanton Negligence

**[2]** In Plaintiff's second argument on appeal, she contends the trial court erred by failing to instruct the jury concerning willful and wanton negligence so as to overcome the defense of contributory negligence. We disagree.

"[O]rdinary contributory negligence is not a defense to an action for willful and wanton negligence[.]" *Meachum v. Faw*, 112 N.C. App. 489, 494, 436 S.E.2d 141, 144 (1993). Our Supreme Court has defined willful negligence in the following manner: "An act is done wilfully when it is done purposely and deliberately in violation of law or when it is done knowingly and of set purpose, or when the mere will has free play, without yielding to reason." *Yancey v. Lea*, 354 N.C. 48, 52-53, 550 S.E.2d 155, 157-58 (2001) (citation and quotation marks omitted). "The true conception of wilful negligence involves a deliberate purpose not to discharge some duty necessary to the safety of the person or property of another[.]" *Id.* (citation and quotation marks omitted). "An act is wanton when it is done of wicked purpose, or when done needlessly, manifesting a reckless indifference to the rights of others." *Id.* at 52, 550 S.E.2d at 157 (citation and quotation marks omitted).

In this case, Plaintiff argues that "Fisher's active and independent acts of mopping behind Plaintiff . . . knowing that Plaintiff would probably slip and fall and suffer serious physical injuries" constituted "conscious and intentional disregard of and indifference to the rights and safety of others." Thus, Plaintiff contends, the trial court erred by not instructing the jury concerning willful and wanton negligence. We find this argument unconvincing because we do not believe the evidence supports a reasonable inference that Fisher, in mopping the

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floor, acted with any purpose or deliberation not to discharge his duty to Plaintiff's safety. Moreover, we do not believe the evidence supports a reasonable inference that Fisher acted with a wicked purpose or manifested a reckless indifference to Plaintiff's safety. Fisher placed two wet-floor signs in the store before he began mopping. Based on the foregoing, we conclude the trial court did not err by not instructing the jury concerning willful and wanton negligence.

**B: Jury Request**

**[3]** In Plaintiff's final argument, she contends it was prejudicial error for the trial court not to submit the surveillance video to the jury in the jury room during deliberations. We find this argument without merit.

In civil cases, "[i]t is well settled that trial exhibits introduced into evidence may not be present in the jury room during deliberations unless both parties consent." *Nunnery v. Baucom*, 135 N.C. App. 556, 559, 521 S.E.2d 479, 482 (1999) (citation omitted). "Further, the failure to make a timely objection to the taking of the exhibits to the jury room does not waive the error; specific consent is required of all parties[.]" *Id.* (citations and quotation marks omitted). "[A]n indication of an unwillingness to consent is sufficient to make it error to allow the exhibits into the jury room." *Dixon v. Taylor*, 111 N.C. App. 97, 109, 431 S.E.2d 778, 784 (1993).

In the case *sub judice*, near the end of the first day of jury deliberations, the foreperson requested that the surveillance video showing Plaintiff's slip and fall, which was admitted into evidence and published to the jury during the trial in this case, be shown to the jury, to which the court responded, "Okay. We'll do that first thing in the morning and then go from there."

The next morning, counsel for Defendants was not present in the courtroom at 9:30 A.M. The trial court sent the jury back to deliberate while counsel for Plaintiff and the court waited for the arrival of counsel for Defendant. The jury sent a second question to the trial court judge: "Can the courtroom be cleared while we view the video, so that we may discuss while viewing?" After counsel for Defendants arrived, the trial court and the attorneys attempted to come to an agreement on the method by which the jury would view the surveillance videos. The colloquy that transpired was lengthy. The trial court and the attorneys discussed a variety of issues, including, among other things, such questions as whether "the jury should come out

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and look at the video and then go back and deliberate,” whether the jury should view the video in the jury room and deliberate while viewing it, or whether the courtroom could “serve as the jury room[.]” Before the attorneys could reach a consensus as to the method by which the jury would view the surveillance videos in this case, the jury informed the deputy that they no longer wanted to see the video and had reached a verdict. Counsel for Plaintiff and Defendants then approached the bench, after which the trial court said the following:

THE COURT: Mr. Foreperson, before you hear the verdict read by the clerk, you had this morning sent out a request to see the video and examine it. Are you withdrawing that request? Is the jury –

MR. FOREPERSON: Yes, sir. . . . On further deliberation, we didn’t really need to see it.

THE COURT: Do all the jurors agree to this?

JURORS: Yes.

THE COURT: Please indicate so by raising hands. Let the record reflect that all jurors raised their hand, indicating they agree with the statement of the foreperson that they were withdrawing their request to see the video. Madam Clerk, would you take the verdict, please?

We believe, in this particular case, the record reflects that the parties never reached the level of specific consent with respect to the questions of whether and how the jury would view the surveillance videotapes. At times throughout the attorneys’ discussion, they appeared to approach agreement about the method by which the videotapes would be viewed by the jury. However, in every instance, either counsel for Plaintiff or counsel for Defendants, after a pause, would object and propose a different method. *See Taylor*, 111 N.C. App. at 109, 431 S.E.2d at 784 (stating that “[t]he attorney was not bound by his earlier objection and was within his rights to change his opinion on the question and the record reflects that he did”). The parties never reached full consensus, and during the time the parties discussed the various methods of viewing the surveillance videotapes, the jury reached a verdict without the videotapes. The trial court established that the verdict was not affected by the failure of the parties to reach specific agreement. The jury indicated that its request for the videotapes was withdrawn because, “[o]n further deliberation, . . . [it] didn’t really need to see it.” The issue here is whether the trial court committed

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[225 N.C. App. 734 (2013)]

error by *not submitting* the videotapes to the jury when the attorneys failed to consent. We conclude this is not error. Rather, it would have been error for the trial court *to submit* the videotapes to the jury without the consent of the parties. *Baucom*, 135 N.C. App. at 559, 521 S.E.2d at 482 (stating that “trial exhibits introduced into evidence may not be present in the jury room during deliberations unless both parties consent”). Because the parties never specifically consented, we hold the trial court did not commit error by failing to permit the jury to view the surveillance videotapes.

NO ERROR.

Chief Judge MARTIN and Judge ERVIN concur.

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STATE OF NORTH CAROLINA  
v.  
PHILLIP DALTON BRASWELL

No. COA12-876

Filed 5 March 2013

**False Pretense—obtaining property having value more than  
\$100,000—motion to dismiss erroneously denied—failure  
to show intent to deceive**

The trial court erred by denying defendant’s motion to dismiss the charge of obtaining property having a value of more than \$100,000 by false pretenses. The State failed to offer sufficient evidence to establish that defendant made a false representation with the intent to deceive.

Appeal by defendant from judgment entered 8 February 2012 by Judge Wayland J. Sermons, Jr., in Nash County Superior Court. Heard in the Court of Appeals 10 December 2012.

*Attorney General Roy Cooper, by Assistant Attorney General Larissa S. Williamson, for the State.*

*Heather L. Rattelade for Defendant-appellant.*

ERVIN, Judge.



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Defendant Phillip Dalton Braswell appeals from a judgment sentencing him to 58 to 79 months imprisonment based upon his conviction of obtaining property having a value of more than \$100,000 by false pretenses. On appeal, Defendant argues that the trial court erred by denying his motion to dismiss the charge that had been lodged against him on the grounds that the record did not contain sufficient evidence to support his conviction. After careful consideration of Defendant's challenge to the trial court's judgment in light of the record and the applicable law, we conclude that Defendant's argument has merit and that his conviction should be vacated.

I. Factual BackgroundA. Substantive Facts

William Greene, who is married to Ola Beth Greene and is Defendant's uncle, had known Defendant all his life. Mr. Greene trusted Defendant because he had "been a good boy all his life." Defendant "lived very conservative[ly]" with his mother, "never spent no money," drove "a \$300 car," ate "at cheap places," and did not take expensive vacations.

After working at a Ford dealership for nineteen years, Defendant left that position in 1997 or 1998 in order to become a "self-employed investor." In 1998, Defendant told the Greenses that he could obtain a better return than the rate of interest that they were currently receiving from their bank by investing money in the stock market, and offered to pay Mr. Greene 10% interest in the event that Mr. Greene loaned him money which Defendant would then invest. Defendant did not, however, claim to be a licensed investment advisor and was not licensed to engage in banking or the selling of investment vehicles.

After agreeing to Defendant's proposition, Mr. Greene loaned Defendant \$10,000 in 1998. At the time of this transaction, Defendant and Mr. Greene executed an agreement in which Defendant agreed to repay the principal amount of the loan, plus 10% interest, to Mr. Greene in one year. However, after the initial one-year term came to an end, Mr. Greene, instead of seeking repayment, renewed the loan for an additional year at 10% interest. The new arrangement, which Mr. Greene described as "rolling over" the loan, was memorialized in a document in which Defendant promised to pay Mr. Greene \$12,100 at the end of the second year, with this amount consisting of the \$11,000 that Mr. Greene was owed at the end of the first year and an additional \$1,100 in interest that would accrue to the second year of

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the loan. Each year between 1998 and 2009, the loan was “rolled over” again. As a result, by October 2008, Defendant owed Mr. Greene a principal amount of \$19,636 and \$1,179 in interest relating to the original loan.<sup>1</sup>

Mr. Greene loaned Defendant additional sums totaling \$86,800 between 1998 and 2006 under the same sort of arrangement. In light of these transactions, Mr. Greene expected to be repaid a total of \$144,116, including interest. On each occasion on which Mr. Greene loaned additional money to Defendant or agreed to extend an existing loan for another year, the parties executed a new agreement which memorialized the “rolling over” of the loan in question and detailed the amount that Defendant was obligated to repay to Mr. Greene at the end of the new loan period. These agreements specified the interest rate and due date, but did not include any terms relating to Defendant’s use of the money. Although Mr. Greene knew that Defendant was “playing the stock market,” at some point Defendant told Mr. Greene that he had “quit messing with the stock market” and had become involved in “day trading.” Mr. Greene had never heard of “day trading” and did not ask Defendant to explain what it was.

In addition, Ms. Greene loaned Defendant money between 1998 and 2006. Ms. Greene did not know the total amount that she had loaned Defendant since Mr. Greene “ke[pt] up with [the] business part.” However, Ms. Greene believed that the total amount that she had loaned Defendant, when combined with the amount that Mr. Greene had loaned him, totaled more than \$100,000. As was the case with the transactions involving Mr. Greene, Defendant and Ms. Greene would execute an agreement extending each loan as it came due. Mr. Green and his wife loaned Defendant a total amount in excess of \$112,000 and expected to be repaid in excess of \$184,000. The loans made by Mr. Greene to Defendant totaled approximately \$86,000, for which he expected a return of \$144,116. The loans made by Mrs. Greene to Defendant totaled approximately \$25,500, for which she expected a return of \$36,396.

Although these loans continued to be made for nearly a decade, the Greenses never asked to be repaid any of the principal or the interest associated with these loans or sought to obtain any information concerning any aspect of Defendant’s use of the money. Similarly, Defendant never paid any money to the Greenses or provided them

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1. At some point during this interval, Defendant reduced the interest rate associated with these loans from 10% to 6%.

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with bank statements or any other sort of documentation relating to these investments. As a result, Mr. Greene never knew how much of the money that he and his wife had invested with Defendant was in Defendant's possession at any specific time. Mr. Greene did ask Defendant about a "Form 1099" annually and was told that Defendant would "tak[e] care of it."

In August or September 2009, the Greenes asked Defendant to repay one of the \$10,000 loans so that they could assist their granddaughter with her college tuition expenses. At that point, Defendant told the Greenes that, while he did not have the money, he was "working on it." When Mr. Greene asked for his money several times during the fall of 2009, Defendant reiterated that he was still "working on it." In December 2009, the Greenes met with Defendant and asked him to explain why they could not get access to their money. At that point, Defendant admitted that he had lost his own money and the monies that had been loaned to him by the Greenes and that he did not have the ability to repay them.

On 4 February 2010, "Mr. and Mrs. Greene [went] to the police department to report a fraud concerning some money that they had invested with [Defendant.]" After speaking with the Greenes, who claimed to have lost \$112,500, and reviewing certain documents, Officer Brandon Medina of the Rocky Mount Police Department obtained a warrant authorizing a search of Defendant's home, which he executed on 9 February 2010. At that time, Officer Medina "ended up seizing 26 items," including "computers[;] towers[;] thumb drives[;]" "tax returns" from 2003 through 2008; statements from RBC, Bank of America, First South, Fidelity Investments, and MBNA; delinquency notices from "the IRS, the City of Rocky Mount, HSBC, [and] FIA[;]" and "a couple of blank Fidelity Investment checkbooks[.]" As of the beginning of 2008, Defendant's account with Fidelity Investments, with whom he had been making investments in his own name, contained over \$100,000. By the end of that year, however, the account had essentially no value.

After being placed under arrest and waiving his *Miranda* rights, Defendant gave a statement, in which he said, in pertinent part, that:

I began investing in stocks to try to make a living in late 1998. I had mentioned to my uncle, Willie Greene, that I could pay him higher interest than a CD so he started investing some money with me too. I took this money and invested [in] stocks along with my own. I did real

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well for a while but then things started to change. I started losing money. I began to borrow from real estate from my mom owned with her permission to recoup my losses. . . . Eventually I had lost my money along with my mom's and my uncle's and aunt's. In May 2008, I had an accident which I was expecting a settlement. I haven't received the settlement yet, but between that [and] work I was expecting to make some or all of what I . . . owed my uncle and aunt. They had been rolling over their investments with me and I thought I would have several years to come up with the money. In September 2009, Willie said that he wanted to cash in one of his investments. I asked him to wait a while and I was going to try to come up with money but didn't. My aunt asked me on December 8, 2009 about their investments and I told them that I had lost their money. I had taken my money that I borrowed from my mom's property and some other money she had to try to invest to rectify the situation. But sadly it went from bad to worse when I had lost that too. . . .

In addition, Defendant told Officer Medina that he had been trying to earn back money he had lost since his "financial situation had gotten worse" about six years earlier and that he had borrowed against the equity that he and his mother had in certain real estate that they owned in an effort to achieve that goal. Defendant did not identify either the date or year when he had lost the money loaned by Mr. and Ms. Greene.

**B. Procedural History**

On 8 February 2010, a warrant for arrest charging Defendant with obtaining property with a value in excess of \$100,000 by false pretenses was issued. On 5 April 2010, the Nash County grand jury returned a bill of indictment charging Defendant with one count of obtaining property with a value of more than \$100,000 by false pretenses. The charge against Defendant came on for trial before the trial court and a jury at the 6 February 2012 criminal session of Nash County Superior Court. At the conclusion of the State's evidence, Defendant unsuccessfully sought dismissal of the charge that had been lodged against him on the grounds that the State had failed to present sufficient evidence to support a conviction. After electing to refrain from presenting any evidence, Defendant unsuccessfully

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renewed his dismissal motion. On 8 February 2012, the jury returned a verdict convicting Defendant as charged. At the conclusion of the ensuing sentencing hearing, the trial court sentenced Defendant to a term of 58 to 79 months imprisonment. Defendant noted an appeal to this Court from the trial court's judgment.

**II. Legal Analysis****A. Standard of Review**

"In order to justify the denial of a motion to dismiss for insufficient evidence, the State must present substantial evidence of '(1) each essential element of the [charged offense] and (2) defendant's being the perpetrator of such offense.' Substantial evidence is 'such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.' On appeal, we view 'the evidence in the light most favorable to the State, giving the State the benefit of all reasonable inferences.' We review a trial court's decision to deny a motion to dismiss for insufficient evidence *de novo*." *State v. Privette*, \_\_\_ N.C. App. \_\_\_, \_\_\_, 721 S.E.2d 299, 308-09 (quoting *State v. Johnson*, 203 N.C. App. 718, 724, 693 S.E.2d 145, 148 (2010) (citation omitted); *State v. Smith*, 300 N.C. 71, 78-79, 265 S.E.2d 164, 169 (1980), and *State v. Morgan*, 359 N.C. 131, 161, 604 S.E.2d 886, 904 (2004), *cert. denied*, 546 U.S. 830, 126 S. Ct. 47, 163 L. Ed. 2d 79 (2005) (additional citation omitted), *disc. rev. denied*, \_\_\_ N.C. \_\_\_, 724 S.E.2d 532 (2012).

**B. Sufficiency of the Evidence**

In his brief, Defendant argues that the trial court erred by denying his dismissal motion on the grounds that the record does not contain sufficient evidence to support his conviction. More specifically, Defendant contends that the evidence, when taken in the light most favorable to the State, did not tend to show that Defendant had made a false statement as alleged in the indictment or that Defendant acted with an intent to deceive or defraud and, instead, merely tended to show that he had failed to fulfill a contractual obligation. Defendant's argument has merit.

"Obtaining property by false pretenses is defined as (1) a false representation of a past or subsisting fact or a future fulfillment or event, (2) which is calculated and intended to deceive, (3) which does in fact deceive, and (4) by which the defendant obtains or attempts to obtain anything of value from another person. [N.C. Gen. Stat. §] 14-100(a). A key element of the offense is that the representation be intention-

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ally false and deceptive.” *State v. Compton*, 90 N.C. App. 101, 103, 367 S.E.2d 353, 354 (1988) (citing *State v. Cronin*, 299 N.C. 229, 242, 262 S.E. 2d 277, 286 (1980), and *State v. Kelly*, 75 N.C. App. 461, 463-64, 331 S.E. 2d 227, 230 *disc. rev. denied*, 315 N.C. 187, 339 S.E. 2d 409 (1985)). In view of the fact “that an indictment, whether at common law or under a statute, to be good must allege lucidly and accurately all the essential elements of the offense endeavored to be charged,” *Cronin*, 299 N.C. at 234, 262 S.E.2d at 281 (quoting *State v. Greer*, 238 N.C. 325, 327, 77 S.E. 2d 917, 919 (1953)), to sustain a charge of obtaining property by false pretenses, the indictment must state the alleged false representation. *See, e.g., State v. Linker*, 309 N.C. 612, 614-15, 308 S.E.2d 309, 310-11 (1983).

The gist of obtaining property by false pretense is the false representation of a . . . fact intended to and which does deceive one from whom property is obtained. The state must prove, as an essential element of the crime, that defendant made the misrepresentation as alleged. If the state’s evidence fails to establish that defendant made this misrepresentation but tends to show some other misrepresentation was made, then the state’s proof varies fatally from the indictments.

*Id.* (citing *Cronin*, 299 N.C. at 242, 262 S.E. 2d at 286; *State v. Yancey*, 228 N.C. 313, 317-18, 45 S.E. 2d 348, 351 (1947), *State v. Carlson*, 171 N.C. 818, 826, 89 S.E. 30, 34 (1916); and *State v. Keziah*, 258 N.C. 52, 54, 127 S.E. 2d 784, 786 (1962)). The falsity of the defendant’s representation and the defendant’s fraudulent intent must frequently be established through the use of circumstantial evidence:

An essential element of the crime described in [N.C. Gen. Stat. §] 14-100 is that the act be done “knowingly and designedly . . . with intent to cheat or defraud.” Intent is “seldom provable by direct evidence. It must ordinarily be proved by circumstances from which it may be inferred.” In determining the absence or presence of intent, the jury may consider “the acts and conduct of the defendant and the general circumstances existing at the time of the alleged commission of the offense charged.”

*State v. Bennett*, 84 N.C. App. 689, 691, 353 S.E.2d 690, 691-92 (1987) (quoting *State v. Hines*, 54 N.C. App. 529, 533, 284 S.E. 2d 164, 167 (1981)). According to N.C. Gen. Stat. § 14-100(b), “[e]vidence of non-

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fulfillment of a contract obligation standing alone shall not establish the essential element of intent to defraud.”

In this case, the indictment returned against Defendant alleged, in pertinent part, that Defendant:

. . . unlawfully, willfully and feloniously did knowingly and designedly with the intent to cheat and defraud, obtain \$112,500.00 in U.S. Currency from William Irvin Green and Ola Beth Green, by means of a false pretense which was calculated to deceive and did deceive.

The false pretense consisted of the following: this property was obtained by the defendant guaranteeing a six percent return on all invested monies from William Irvin Green and Ola Beth Green, when in fact the defendant did not invest the monies into legitimate financial institutions.

The most logical interpretation of the allegations contained in the indictment returned against Defendant in this case is that Defendant falsely represented that he would earn a six percent return for the Greenes by investing their money when, in reality, he intended to defraud the Greenes by simply taking their money rather than investing it in “legitimate financial institutions.” In other words, the “false pretense” or “false representation” which Defendant allegedly made to the Greenes consisted of a statement that Defendant was borrowing money from the Greenes for investment-related purposes despite the fact that he did not actually intend to invest the money that he received from them in any “legitimate financial institution.” A careful review of the record developed at trial reveals the complete absence of any support for this allegation.

As an initial matter, the State did not present any evidence tending to show that Defendant failed to invest the Greenes’ money in “legitimate financial institutions.” For example, the State did not utilize any of the records seized from Defendant’s residence to show that Defendant had not, in fact, invested the money that he received from the Greenes. On the contrary, the fact that Defendant’s account with Fidelity Investments contained \$100,000 in early 2008 suggests that he did, in fact, make investments with such institutions.<sup>2</sup>

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2. This inference is bolstered by the information contained in the statement which Defendant gave to Officer Medina, in which he indicated that he had invested the money that he had received from the Greenes and that, after a certain point in time, his invest-

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Although the State contends that the fact that the Fidelity Investment account was held by Defendant personally rather than in the name of the Greenes shows that his representation that the Greenes' money would be invested in "legitimate financial institutions" was a false one, we do not find this contention persuasive given the absence of any evidence tending to show that Defendant ever represented that he would keep the Greenes' money separate from his own personal investments and the fact that Defendant did not, as a practical matter, appear to have any other way of carrying out his promise to the Greenes. As a result, the record simply does not show that the representation that Defendant allegedly made to the Greenes was a false one.

In addition, we note that the State offered no direct or circumstantial evidence tending to show that, instead of investing the money he borrowed from the Greenes, Defendant converted it to his own use. For example, the State presented no evidence tending to show that Defendant had used the money that he obtained from the Greenes to make any significant personal expenditures, such as the payment of travel costs or the purchase of real estate, motor vehicles, or other items, at any time between 1998 and 2009. On the contrary, the undisputed record evidence tends to show that Defendant lived with his mother and led a "conservative" lifestyle as a part of which he took no vacations, dined at "cheap restaurants," and drove a "\$300 car." As a result, we conclude that the State failed to offer sufficient evidence to establish that Defendant made a false representation with the intent to deceive when he told the Greenes that he intended to invest the money that they loaned to him in "legitimate financial institutions" and would repay it with interest at the specified time and that the record evidence, taken in the light most favorable to the State, simply tends to show that Defendant, after seriously overestimating his own investing skills, made a promise that he was unable to keep.

In urging us to reach a contrary conclusion, the State notes that Defendant "never indicated that there was no money for Mr. Greene to roll over and actually reassured Mr. Greene that his money was safe." This argument presupposes, however, that Defendant had

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ment activities had gone catastrophically awry. As a result of the fact that, "[w]hen the State introduces in evidence exculpatory statements of the defendant which are not contradicted or shown to be false by any other facts or circumstances in evidence, the State is bound by these statements," *State v. Bruton*, 264 N.C. 488, 499, 142 S.E.2d 169, 176 (1965) (quoting *State v. Carter*, 254 N.C. 475, 479, 119 S.E. 2d 461, 464 (1961)), we are entitled to consider Defendant's statement for the purpose of determining whether the record adequately supports his conviction.



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already lost all of the money that he had previously borrowed from the Greenes at a time when he was still obtaining additional loans from them. However, despite seizing Defendant's computers and numerous financial and tax-related records, the State never elicited any evidence tending to show that, as of the date of any particular loan from Mr. or Ms. Greene to Defendant, Defendant had already lost all of the money that they had previously provided to him. Similarly, the record does not establish the date upon which Defendant told Mr. Greene that his money was "safe" and simply indicates that this statement was made at an unspecified point in time when the "market went down." Moreover, even if Defendant was reluctant to admit that he had lost the Greenes' money through bad investments, such behavior would not tend to show that Defendant had failed to invest the Greenes' money with "legitimate financial institutions" to begin with.

In addition, the State asserts that Defendant "never showed Mr. Greene a bank statement or any account information to confirm that the money was actually invested somewhere." Although the State correctly points out that Defendant never provided the Greenes with any information concerning the manner in which he had invested the money that they had loaned to him, we are unable to see how this evidence tends to establish that Defendant did not invest the Greenes' money in "legitimate financial institutions" in the first place. The record contains no indication that Defendant had any obligation to consult with either of the Greenes about the manner in which he intended to invest their money or to provide them with information concerning the nature and extent of his investment decisions. On the contrary, the Greenes' testimony clearly establishes that they never asked for information about the status of their investments and appeared to have had little to no interest in receiving information about that subject. As a result, the fact that Defendant never provided the Greenes with any information concerning the status of their investments does not tend to show that Defendant falsely represented that he would take the money that they loaned to him and invest it in "legitimate financial institutions."

Furthermore, the State emphasizes Mr. Greene's testimony to the effect that Defendant "never produced a 1099 form so that Mr. Greene could include the investment as part of his taxes" and argues that Defendant's failure to provide such a tax reporting document tends to show that Defendant did not invest the money that he had borrowed from the Greenes. Once again, however, we are unable to infer that Defendant never intended to invest the money that he obtained from

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the Greenes in “legitimate financial institutions” from the fact that Defendant failed to provide them with a Form 1099. Aside from the fact that the State did not establish that the Greenes were ever entitled to receive such a document from Defendant, the fact that Defendant may have failed to inform the Internal Revenue Service of any interest income that the Greenes might have earned does not, as a logical matter, tend to show that Defendant never intended to invest the monies that he received from them in “legitimate financial institutions” in the first place.

Finally, the State notes that Defendant told Officer Medina that he had been trying to earn the money needed to repay the Greenes for six years and suggests that, given that Officer Medina spoke with Defendant in 2010, Defendant had lost all of the money that he had borrowed from the Greenes by 2004. The record does not, however, contain any information tending to show the total amount of money in Defendant’s actual possession in 2004 or at any other time. In addition, the undisputed record evidence tends to show that Defendant had at least \$100,000 in an investment account as of January 2008. Furthermore, even if Defendant had lost all the money that he had invested for the Greenes by a particular date, that fact would not tend to show that he had failed to invest the Greenes’ money in “legitimate financial institutions.” As a result, none of the State’s efforts to convince us that the record does, in fact, contain sufficient evidence to support Defendant’s conviction are persuasive.

**III. Conclusion**

Thus, for the reasons set forth above, we conclude that the record does not contain sufficient evidence tending to show that Defendant failed to invest the money that he borrowed from the Greenes in “legitimate financial institutions” to support Defendant’s conviction for obtaining property by false pretenses and that the trial court should have granted Defendant’s dismissal motion. As a result, the trial court’s judgment should be, and hereby is, vacated.

VACATED.

Chief Judge MARTIN and Judge GEER concur.

**STATE v. COOK**

[225 N.C. App. 745 (2013)]

STATE OF NORTH CAROLINA

v.

ARTHUR JUNIOR COOK, DEFENDANT

No. COA12-902

Filed 5 March 2013

**1. Sentencing—new sentence more severe at resentencing—statutorily mandated sentence**

The Court of Appeals granted defendant's petition for a writ of *certiorari* and determined that defendant was not entitled to a new sentencing hearing even though the trial court imposed a new sentence at the resentencing hearing that was more severe than the prior vacated sentence. The trial court did not violate N.C.G.S. § 15A-1335 since the trial court imposed a statutorily mandated sentence which it improperly failed to do the first time.

**2. Sentencing—prior record level points—calculation—harmless error**

The Court of Appeals did not need to address any of defendant's arguments regarding additional prior record level points, as any error on the part of the State or the trial court in calculating any of defendant's additional points would not change his record level and was thus harmless.

Appeal by defendant from judgments entered 5 March 2012 by Judge W. Robert Bell in Superior Court, Mecklenburg County. Heard in the Court of Appeals 31 January 2013.

*Attorney General Roy A. Cooper, III, by Assistant Attorney General Joseph L. Hyde, for the State.*

*Anne Bleyman, for defendant-appellant.*

STROUD, Judge.

Defendant appeals judgments sentencing him to two consecutive terms of 135 to 171 months imprisonment, arguing that the trial court erroneously resentenced him. For the following reasons, we affirm.

**I. Background**

This case originally came before this Court in *State v. Cook*, \_\_\_ N.C. App. \_\_\_, 721 S.E.2d 741, *disc. review denied and appeal dismissed*, \_\_\_ N.C. \_\_\_, 724 S.E.2d 917 (2012) ("*Cook I*"); in that opin-

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ion we summarized the background of this case, which we will not repeat here. In *Cook I*, we found no error in defendant's trial and remanded to the trial court for resentencing and directed that "the trial court . . . identify on which of the thirty-seven prior felonies and misdemeanors the court based its prior conviction point assignments to determine that defendant was a prior record level VI offender." \_\_\_ N.C. App. at \_\_\_, 721 S.E.2d at 749. Originally, "[t]he trial court determined that defendant had a total of twenty-four prior record points and was a prior record level VI offender. Defendant was sentenced to two consecutive terms of 120 months to 153 months imprisonment." *Id.* at \_\_\_, 721 S.E.2d at 745. Upon remand, the trial court determined that defendant had 25 points and again determined that defendant was a prior record level VI offender and sentenced defendant to two consecutive terms of 135 months to 171 months imprisonment. Defendant appeals.

## II. Petition for Writ of Certiorari

Defendant acknowledges that he was resentenced in the presumptive range and that a sentence in the presumptive range is generally not appealable. *See generally* N.C. Gen. Stat. § 15A-1444(a1) (2009) ("A defendant who has been found guilty, or entered a plea of guilty or no contest to a felony, is entitled to appeal as a matter of right the issue of whether his or her sentence is supported by evidence introduced at the trial and sentencing hearing only if the minimum sentence of imprisonment does not fall within the presumptive range for the defendant's prior record or conviction level and class of offense. Otherwise, the defendant is not entitled to appeal this issue as a matter of right but may petition the appellate division for review of this issue by writ of certiorari."). Accordingly, defendant petitions this Court for a writ of certiorari to hear his appeal regarding his sentence within the presumptive range. We grant defendant's petition for a writ of certiorari and will review his sentence.<sup>1</sup>

## III. Sentencing Term

The trial court originally sentenced defendant to two consecutive terms of 120 months to 153 months imprisonment and noted on the judgments that this was "within the presumptive range[.]" However, as defendant was a prior record level VI offender who was sentenced as a Class C offender for crimes committed in September of 2009, the

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1. As we are granting defendant's petition for a writ of certiorari we need not address defendant's petition requesting we suspend the rules of appellate procedure and hear defendant's appeal pursuant to North Carolina Rule of Appellate Procedure 2.

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correct presumptive range was actually 135 months to 171 months imprisonment. *See* N.C. Gen. Stat. § 15A-1340.17(c), (e) (2007). As the trial court itself noted at resentencing, “[T]his sentence is actually greater than the sentence the defendant received at the first trial; . . . the defendant receive[d] what the Court believes is an illegal sentence in the first trial that is void because there are no findings of aggravation or mitigation made.” Accordingly, the trial court originally sentenced defendant “illegal[ly]” as defendant was not actually sentenced within the correct presumptive range as noted by the judgments. *See id.*; *see generally State v. Whitehead*, \_\_ N.C. \_\_, \_\_, 722 S.E.2d 492, 495 (2012) (noting that sentences that contravene statutes are “illegal” and should be vacated).

[1] Defendant first contends that he “is entitled to a new sentencing hearing because the trial court committed error in imposing a new sentence at the resentencing hearing more severe than the prior vacated sentence for the same offenses in violation of . . . [defendant’s] rights.” (Original in all caps.) N.C. Gen. Stat. § 15A-1335 provides that

[w]hen a conviction or sentence imposed in superior court has been set aside on direct review or collateral attack, the court may not impose a new sentence for the same offense, or for a different offense based on the same conduct, which is more severe than the prior sentence less the portion of the prior sentence previously served.

N.C. Gen. Stat. § 15A-1335 (2009). But this Court has noted that if the original sentence is illegal, this statute does not permit the trial court to impose another illegal sentence on remand:

The sole exception to N.C. Gen. Stat. § 15A-1335, and the only circumstance in which a higher sentence will be allowed on resentencing, is when a statutorily mandated sentence is required by the General Assembly. *See State v. Kirkpatrick*, 89 N.C. App. 353, 355, 365 S.E.2d 640, 641 (1988) (“where the trial court is required by statute to impose a particular sentence (on resentencing) § 15A-1335 does not apply to prevent the imposition of a more severe sentence”). Thus, when the General Assembly’s intent is clear as to the statutorily mandated sentence required on resentencing, § 15A-1335 does not apply.

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*State v. Holt*, 144 N.C. App. 112, 116-17, 547 S.E.2d 148, 152 (brackets omitted), *per curiam disc. review improvidently allowed*, 354 N.C. 224, 554 S.E.2d 652 (2001); *see also Whitehead*, \_\_\_ N.C. at \_\_\_, 722 S.E.2d at 495.

Here, defendant was originally illegally sentenced. See N.C. Gen. Stat. § 15A-1340.17(c), (e); *see generally Whitehead*, \_\_\_ N.C. at \_\_\_, 722 S.E.2d at 495. Upon resentencing the trial court properly resentenced defendant within the presumptive range. See N.C. Gen. Stat. § 15A-1340.17(c), (e). As such, the trial court did not violate N.C. Gen. Stat. § 15A-1335 as the trial court imposed “a statutorily mandated sentence” which it improperly failed to do the first time. *Holt*, 144 N.C. App. at 116, 547 S.E.2d at 152; *see* N.C. Gen. Stat. § 15A-1340.17(c), (e). Accordingly, this argument is overruled.

## IV. Insufficient Evidence

[2] Defendant also contends that “the trial court abused its discretion and erred in relying on improper and insufficient evidence to determine . . . [defendant’s] prior record level and sentence in violation of . . . [defendant’s] rights.” (Original in all caps.) Defendant first notes that the trial court “[p]roperly” assigned him 7 points for his North Carolina convictions. Defendant then notes that

the trial court found . . . that . . . [defendant’s] prior 1996 South Carolina armed robbery conviction was substantially similar to the North Carolina N.C. Gen. Stat. § 14-87 offense of robbery with firearms or other dangerous weapons. . . . The trial court classified this prior South Carolina offense as a Class D felony and assigned . . . [defendant] six record level points for the conviction.

Defendant does not argue that N.C. Gen. Stat. § 14-87 was not substantially similar to the South Carolina armed robbery conviction nor does he contest the assignment of 6 points. Thus, defendant does not contest 13 of his points.

Defendant further notes that “South Carolina convictions included in the calculation of . . . [defendant’s] prior record level were for two counts of ‘forgery’ [and] one count of ‘grand larceny[;]’ ” defendant contends that as to these offenses the State did not “meet its burden of proof that the out-of-state convictions were substantially similar to an offense in our jurisdiction[;]” however, the trial court treated all of these convictions as Class I felonies.

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[T]he default classification for out-of-state felony convictions is Class I. Where the State seeks to assign an out-of-state conviction a more serious classification than the default Class I status, it is required to prove by the preponderance of the evidence that the conviction at issue is substantially similar to a corresponding North Carolina felony. However, where the State classifies an out-of-state conviction as a Class I felony, no such demonstration is required.

*State v. Hinton*, 196 N.C. App. 750, 755, 675 S.E.2d 672, 675 (2009) (citation and quotation marks omitted). Along with defendant's 13 points, these three Class I convictions give defendant 6 more points, for a total of 19 points. *See* N.C. Gen. Stat. § 15A-1340.14(b)(4) (2007) ("For each prior felony Class H or I conviction, 2 points."). With 19 points defendant would have a prior record level of VI. *See* N.C. Gen. Stat. § 15A-1340.14(c)(6) ("Level VI—At least 19 points.") Thus, we need not address any of defendant's arguments regarding additional points, as any error on the part of the State or the trial court in calculating any of defendant's additional record level points would not change his record level and is harmless. *See State v. Lowe*, 154 N.C. App. 607, 610-11, 572 S.E.2d 850, 854 (2002). Accordingly, this argument is overruled.

## V. Conclusion

For the foregoing reasons, we affirm.

AFFIRMED.

Judges STEPHENS and DILLON concur.

**STATE v. DEW**

[225 N.C. App. 750 (2013)]

STATE OF NORTH CAROLINA

v.

JOHN EARL DEW, JR.

No. COA12-642

Filed 5 March 2013

**1. Evidence—victims’ credibility—statement by victims’ mother—reaction when told of abuse**

There was no plain error in a prosecution for indecent liberties where the victims’ mother repeated in court a statement that she believed her daughters. Taken in context, the statement was made in the course of a discussion of her emotional state when the victims told her that defendant had sexually abused them. Assuming that the admission of this portion of her testimony was improper, defendant did not show that the jury would have probably reached a different result absent the error.

**2. Evidence—victims’ credibility—victims’ appearance and behavior—meeting with detective**

There was no plain error in a prosecution for indecent liberties where a detective allegedly vouched for a victim’s credibility in his testimony. In context, the detective was simply describing the victim’s appearance and behavior as she observed it during their meeting.

**3. Evidence—victims’ credibility—detective’s statement—invited error**

There was no error in a prosecution for indecent liberties where a detective allegedly testified on cross-examination that the victims were “extremely credible.” Defendant was not entitled to seek appellate relief on the grounds that the challenged testimony should have been excluded after directly posing a question that incorporated inadmissible material.

**4. Evidence—exclusion of evidence—offer of proof required on appeal**

No error was found in the exclusion of evidence by the trial court in an indecent liberties case where there was no offer of proof.



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**5. Witnesses—expert—family therapist—indecent liberties prosecution**

The trial court did not err in an indecent liberties prosecution by allowing a family therapist to testify as an expert where she clearly had the necessary qualifications and defendant did not demonstrate that her methods were unreliable.

**6. Evidence—victims’ credibility—therapist’s opinion**

The trial court did not err in an indecent liberties prosecution by allowing testimony from a family therapist in which, according to defendant, the therapist vouched for the victims’ credibility. In context, the therapist never directly stated that the victims were believable, but described the actions and reactions of sexual abuse victims in general.

**7. Constitutional Law—effective representation of counsel—admission of evidence**

An indecent liberties defendant was not entitled to relief on ineffective assistance of counsel grounds where he did not show deficient representation or prejudice from the admission of certain evidence. Defendant’s ineffective representation claim regarding a detective’s testimony on cross-examination was dismissed without prejudice to a future motion for appropriate relief because the record did not permit a proper evaluation of the evidence.

Appeal by defendant from judgments entered 13 December 2011 by Judge Eric Levinson in Cleveland County Superior Court. Heard in the Court of Appeals 7 January 2013.

*Attorney General Roy Cooper, by Assistant Attorney General Teresa M. Postell, for the State.*

*Mark Montgomery for Defendant-Appellant.*

ERVIN, Judge.

Defendant John Earl Dew, Jr., appeals from judgments entered based upon his convictions of six counts of taking indecent liberties with a child stemming from conduct he allegedly engaged in with two sisters, V.M. and B.M.<sup>1</sup> On appeal, Defendant argues that the trial court committed plain error by allowing Angela M. to testify that she believed Becky and Violet, who are her daughters; committed plain

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1. V.M. and B.M. will be referred to as “Violet” and “Becky,” respectively, throughout the remainder of this opinion for ease of reading and to protect the children’s privacy.

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error by allowing Detective Tracy Curry of the Cleveland County Sheriff's Department to offer expert testimony vouching for Becky and Violet's credibility; erred by excluding evidence that Defendant had cooperated with investigating officers; and erred by allowing Carol Hollandsworth to testify as an expert and to vouch for Becky and Violet's credibility. In addition, Defendant contends that, to the extent that any of his substantive challenges to the trial court's judgments were not properly preserved for appellate review, he is entitled to relief on ineffective assistance of counsel grounds. After careful review of Defendant's challenges to the trial court's judgments in light of the record and the applicable law, we conclude that Defendant is not entitled to any relief from the trial court's judgments.

I. Factual BackgroundA. Substantive Facts1. State's Evidence

Becky, who was born in 1995, was sixteen years old at the time of trial. Her sister, Violet, was born in 1993 and was eighteen at the time of trial. Defendant, who was married to their mother's sister and who lived with his wife and three children in Casar, was Becky and Violet's uncle.

Defendant began molesting Becky and Violet around 2001 and continued to do so until 2006. The sexual abuse of which Defendant was accused usually occurred at family gatherings held at Defendant's home; however, Defendant was also accused of abusing Becky and Violet at other times when he was alone with one or the other of them.

Becky testified that Defendant had sexually molested her about fifty times, beginning when she was five or six years old and continuing until she was twelve. The abuse that Becky described consisted of Defendant rubbing her vagina with his hands and forcing her to touch his penis. Defendant usually touched Becky during nighttime games of hide-and-seek, during which she would hide in Defendant's yard away from the other children. Becky also recalled an incident that occurred during a family vacation to Hershey, Pennsylvania, when Defendant gave her a piggyback ride and tried to rub her vagina while carrying her on his back. On another occasion, Defendant sat Becky on his lap and made her watch a pornographic video, in which a child performed fellatio, and asked Becky if she wanted to do that to him. During one family gathering on the Fourth of July, Defendant sat

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Becky on his lap to watch fireworks. While she was on his lap, Defendant made her put her hand inside his pants and guided her hand up and down his penis. Becky thought she was the only one who was subjected to this abuse.

Violet testified that Defendant began molesting her when she was six or seven years old. Like Becky, Violet recalled family gatherings held at Defendant's house at which she and the other girls would play hide and seek. During these games, Defendant would put his hand inside Violet's pants and move his finger back and forth on her vagina. According to Violet, Defendant touched her in this manner on ten to twenty different occasions. On one occasion, Defendant rubbed Violet's vagina so much that she developed a rash there.

Violet recalled several other instances during which she was subjected to sexual abuse by Defendant as well. When she was six or seven years old, Defendant let her sit on his lap and drive his truck. As she drove, Defendant put his hand inside Violet's pants and rubbed his finger against her vagina until they arrived at his house. Defendant also touched Violet while giving her a piggyback ride on two occasions, one of which occurred in Hershey and the other of which occurred at Defendant's home. In addition, Violet recalled seeing a screensaver on Defendant's computer depicting the silhouette of a female performing fellatio. Once, while Violet was alone with Defendant at his house, Defendant began tickling her. After grabbing her ankle and jerking her up so that she was looking up at his stomach and pelvic area, Defendant asked Violet to put her hand inside his pants. After Violet failed to make any response to this inquiry, Defendant took her hand and put it in his pants, at which point his breathing got heavy and he said that "it was okay."

When she reached the fourth or fifth grade, Violet told Defendant to stop touching her, an instruction with which he complied. Several years later, Violet told a friend that Defendant had abused her when she was younger. About six months later, after watching a television program with her mother about victims of child molestation, Violet went to pick her sister up from basketball practice. After becoming very upset, Violet told her sister that Defendant had molested her as a child. In response, Becky told Violet that she had been abused by Defendant as well. Upon returning home, both girls told their mother, who reported the incidents to Detective Curry.

Carol Hollandsworth, a family therapist, provided counseling to both Violet and Becky. After describing Violet and Becky's mental

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states, Ms. Hollandsworth testified that both children behaved in a manner that was consistent with symptoms exhibited by children who had been sexually abused.

2. Defendant's Evidence

Defendant's three children testified that the children in Defendant's extended family only played hide-and-seek a few times and that Defendant rarely played hide-and-seek with them. During family gatherings, the adults, including Defendant, usually stayed together while the children played separately. None of Defendant's children recalled seeing anything suspicious about the manner in which Defendant interacted with Becky and Violet or ever heard Violet and Becky claim to have been molested.

Defendant acknowledged having hosted family gatherings at his home and admitted that he had played hide-and-seek with the girls on one occasion when they were younger. In addition, Defendant admitted that he had given both Violet and Becky multiple piggyback rides. Although he had pornographic materials in his home, Defendant denied having ever shown such materials to Violet and Becky and repeatedly denied having ever molested either child.

B. Procedural History

On 12 January 2011, the Cleveland County grand jury returned bills of indictment charging Defendant with three counts of taking indecent liberties with a minor involving acts committed against Violet and three counts of taking indecent liberties with a child involving acts committed against Becky. The charges against Defendant came on for trial before the trial court and a jury at the 8 December 2011 criminal session of Cleveland County Superior Court. On 13 December 2011, the jury returned verdicts convicting Defendant as charged. At the ensuing sentencing hearing, the trial court entered judgments sentencing Defendant to six consecutive terms of 16 to 20 months imprisonment, the first three of which involved active terms of incarceration and the last three of which were suspended on the condition that Defendant be placed on supervised probation for 36 months subject to certain terms and conditions. Defendant noted an appeal to this Court from the trial court's judgments.

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II. Legal AnalysisA. Ms. M.'s Testimony

[1] In his first challenge to the trial court's judgments, Defendant contends that the trial court erred by allowing Angela M., the mother of Becky and Violet, to testify that she believed the victims. More specifically, Defendant challenges the admission of Ms. M.'s testimony that,

They said just—they—I don't remember even which one of it was, but they said they had been messed with. And I said, what? They said, "We've been molested." And I said, "By who?" And they said, "Uncle John." And I just jumped up and down and screamed because I couldn't, you know, it was hard to believe. And I said, "No he didn't, no he didn't." And I mean, not telling them that he really didn't, but just—I couldn't believe that he'd done it. But I believe my girls and I looked at them and I—and I just remember hugging them and I said, oh God. You know what this means? And I said, you know, I'll do whatever I have to do to prosecute and they understood that.

According to Defendant, Ms. M.'s statement that "I believe my girls" was inadmissible.

As he candidly acknowledges in his brief, Defendant did not object to the admission of this testimony at trial. For that reason, we review this aspect of Defendant's challenge to the trial court's judgments for plain error. N.C. R. App. P. 10(a)(4); *State v. Mendoza*, 206 N.C. App. 391, 395, 698 S.E.2d 170, 174 (2010). In order to establish that plain error occurred, a convicted criminal defendant must show that a fundamental error occurred during the defendant's trial which " 'had a probable impact on the jury's finding that the defendant was guilty.' " *State v. Lawrence*, \_\_ N.C. \_\_, \_\_, 723 S.E.2d 326, 333 (2012) (quoting *State v. Odom*, 307 N.C. 655, 660, 300 S.E.2d 375, 378 (1983)). "[P]lain error review should be used sparingly, only in exceptional circumstances, to reverse criminal convictions on the basis of unpreserved error[.]" *Id.*

A lay witness is entitled to testify "in the form of opinions or inferences . . . [which are] (a) rationally based on [his] perception . . . and (b) helpful to a clear understanding of his testimony or the determination of a fact in issue." N.C. Gen. Stat. § 8C-1, Rule 701. When taken in context, Ms. M.'s statement that she believed her

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daughters was made in the course of a discussion of her emotional state at the time that Violet and Becky informed her that Defendant had sexually abused them. Assuming, without in any way deciding, that the admission of this portion of Ms. M.'s testimony was improper, Defendant has failed to show that, absent the error, the jury would have probably reached a different result. Simply put, in view of the relatively incidental nature of the challenged statement and the fact that most jurors are likely to assume that a mother will believe accusations of sexual abuse made by her own children, we cannot conclude that the challenged portion of Ms. M.'s testimony had any significant impact on the jury's decision to convict Defendant. See *State v. Ramey*, 318 N.C. 457, 466, 349 S.E.2d 566, 572 (1986) (stating that "[i]t is unlikely that the jury gave great weight to the fact that a mother believed that her son was truthful"). As a result, after reviewing the record in its entirety, we cannot hold that the trial court committed plain error by failing to preclude Ms. M. from testifying that she believed her daughters.

B. Detective Curry's Testimony

[2] Secondly, Defendant argues that Detective Curry impermissibly vouched for Becky and Violet's credibility. Once again, given that Defendant did not object to the admission of the challenged testimony at trial, we review the trial court's failure to preclude the admission of this testimony utilizing a plain error standard of review. After engaging in the required plain error review, we conclude that Defendant's argument lacks merit.

As an initial matter, Defendant argues that Detective Curry testified that the children "actually remembered incidents, attesting as an expert that the incidents actually happened as they claimed." Defendant bases this claim upon the following testimony, which the State elicited on direct examination:

Q. What were your impressions of [Becky], her manner and her demeanor when you met with her in November of 2010?

A. [Becky] appeared to be—to have more of a—she was matter of fact. She remembered less. She remembered incidents. She remembered very specific incidents but he didn't—she did not remember times. And she was—and in looking and trying to get her to explain specific incidents, she would actually remember—it would appear that she would remember as we were

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talking if I said something that would [cue] her to her memory. Not a lead, but a [cue]. So, that she would actually think about when I . . . would say where were you, she would literally think and then say oh yeah, I remember this. That's very common as well. But time, she still didn't—like [Violet], had very limited concept of time because of the age of the incident.

Although Defendant correctly asserts that a witness may not vouch for the credibility of the alleged victim in a child sexual abuse case, *State v. Stancil*, 355 N.C. 266, 266-67, 559 S.E.2d 788, 789 (2002) (*per curiam*); *State v. Aquallo*, 318 N.C. 590, 599, 350 S.E.2d 76, 81 (1986) (holding that expert testimony to the effect that the victim was “believable” was inadmissible), a careful examination of the challenged testimony, when read in context, clearly indicates that, instead of vouching for the veracity of Becky's allegations, Detective Curry was simply describing Becky's appearance and behavior as she observed it during their meeting.

According to well-established North Carolina law, a witness is entitled to utilize “shorthand statements of facts” during the course of his or her testimony, *State v. Eason*, 336 N.C. 730, 747, 445 S.E.2d 917, 927 (1994) (stating that N.C. Gen. Stat. § 8C-1, Rule 701 allows the admission of “what are frequently called ‘shorthand statements of facts’ ”), *cert. denied*, 513 U.S. 1096, 115 S. Ct. 764, 130 L. Ed. 2d 661 (1995), on the theory that “instantaneous conclusions of the mind as to the appearance, condition, or mental or physical state of persons, animals, and things, derived from observation of a variety of facts presented to the senses at one and the same time, are, legally speaking, *matters of fact*, and are admissible in evidence.” *State v. Gopal*, 186 N.C. App. 308, 317, 651 S.E.2d 279, 285 (2007) (emphasis in the original) (quoting *State v. Lloyd*, 354 N.C. 76, 109, 552 S.E.2d 596, 620 (2001)), *aff'd*, 362 N.C. 342, 661 S.E.2d 732 (2008). Detective Curry began her response to the prosecutor's question concerning Becky's “manner” and “demeanor” by detailing Becky's appearance, expressions, mannerisms, and thought processes. When considered in context, the challenged testimony consisted of nothing more than a permissible discussion of the manner in which Becky communicated with Detective Curry, including the limitations to which Becky's ability to recount past events was subject, based on Detective Curry's observations during her meeting with Becky. *State v. Waddell*, 130 N.C. App. 488, 501-02, 504 S.E.2d 84, 92 (1998) (holding that witness's descriptions of a child's conduct constituted an admissible “short-

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hand statement of fact”). As a result, this component of Detective Curry’s testimony was not inadmissible.

**[3]** Secondly, Defendant challenges Detective Curry’s assertion that Becky and Violet were “extremely credible.” The challenged testimony occurred on cross-examination, when Detective Curry testified that:

Q. Okay. Did you ever tell them that I—I believe you two and I think you are extremely credible?

A. Did I ever tell who that?

Q. [Violet] and/or [Becky]?

A. I’m sure I did.

Although the statement upon which Defendant predicates this aspect of his challenge to the trial court’s judgments clearly constitutes an affirmation of Becky and Violet’s credibility, “[a] defendant is not prejudiced by . . . error resulting from his own conduct.” N.C. Gen. Stat. § 15A-1443(c). As a result, “a defendant who invites error has waived his right to all appellate review concerning the invited error, including plain error review.” *State v. Barber*, 147 N.C. App. 69, 74, 554 S.E.2d 413, 416 (2001), *disc. review denied and dismissed*, 355 N.C. 216, 560 S.E.2d 142 (2002). The testimony about which Defendant now complains stemmed from language contained in a leading question posed by Defendant’s trial counsel as part of an apparent effort to challenge Detective Curry’s credibility. Having directly posed a question that incorporated inadmissible material, Defendant is simply not entitled to seek appellate relief on the grounds that the challenged testimony should have been excluded. *See Gopal*, 186 N.C. App. at 319, 651 S.E.2d at 287 (stating that “[s]tatements elicited by a defendant on cross-examination are, even if error, invited error, by which a defendant cannot be prejudiced as a matter of law”). Thus, since this alleged error was clearly invited by Defendant, it provides no basis for an award of appellate relief. *State v. Gay*, 334 N.C. 467, 485, 434 S.E.2d 840, 850 (1993) (stating that “‘invited error’ does not merit relief”) (citing *State v. Rivers*, 324 N.C. 573, 575-76, 380 S.E.2d 359, 360 (1989); *State v. Greene*, 324 N.C. 1, 12, 376 S.E.2d 430, 438 (1989), *sentence vacated on other grounds*, 494 U.S. 1022, 110 S. Ct. 1465, 108 L. Ed. 2d 603 (1990); *State v. Silvers*, 323 N.C. 646, 655, 374 S.E.2d 858, 864 (1989)). As a result, Defendant is not entitled to appellate relief based upon either of his challenges to Detective Curry’s testimony.



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C. Defendant's Cooperation

[4] Thirdly, Defendant contends that the trial court erred by refusing to allow the admission of evidence that he cooperated with Detective Curry. In support of this assertion, Defendant points to his cross-examination of Detective Curry, during which the trial court sustained the State's objection when his trial counsel asked, "Now, I was—was Mr. Dew cooperative with you?" Defendant is not entitled to relief from the trial court's judgments on the basis of this ruling.

"It is well established that an exception to the exclusion of evidence cannot be sustained where the record fails to show what the witness' testimony would have been had he been permitted to testify." *State v. Simpson*, 314 N.C. 359, 370, 334 S.E.2d 53, 60 (1985) (citing *State v. Cheek*, 307 N.C. 552, 561, 299 S.E.2d 633, 639 (1983)) (other citations omitted). For that reason, "in order for a party to preserve for appellate review the exclusion of evidence, the significance of the excluded evidence must be made to appear in the record and a specific offer of proof is required unless the significance of the evidence is obvious from the record." *Id.* (citing *Currence v. Hardin*, 296 N.C. 95, 99-100, 249 S.E.2d 387, 390 (1978)). "In the absence of an adequate offer of proof, [w]e can only speculate as to what the witness' answer would have been." *State v. Ginyard*, 122 N.C. App. 25, 33, 468 S.E.2d 525, 531 (1996) (quoting *State v. Barton*, 335 N.C. 741, 749, 441 S.E.2d 306, 310-11 (1994) (internal quotation marks omitted)). As a result of the fact that the record does not contain the substance of any answer that Detective Curry might have given to the question posed by Defendant's trial counsel, we have no basis for determining the extent, if any, to which the trial court's ruling might have prejudiced Defendant. *State v. Lynch*, 337 N.C. 415, 423, 445 S.E.2d 581, 584 (1994) (holding that the defendant's failure to "show what the response of the witness would have been if he had been allowed to answer" precluded a determination of whether "the defendant was prejudiced by the exclusion of the answers"); *State v. Miller*, 321 N.C. 445, 452, 364 S.E.2d 387, 391 (1988) (stating that, "[b]y failing to preserve the evidence for our review, defendant has deprived us of the necessary record from which to ascertain if the alleged error was prejudicial"). As a result, Defendant is not entitled to relief from the trial court's judgments on the basis of this contention.

D. Expert Testimony of Ms. Hollandsworth

Fourthly, Defendant argues that the trial court erred by admitting the testimony of Ms. Hollandsworth in two different respects. First,

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Defendant argues that the trial court erred by allowing Ms. Hollandsworth to testify as an expert in family counseling. Secondly, Defendant argues that the trial court erroneously allowed Ms. Hollandsworth to vouch for the credibility of Violet and Becky. We do not believe that either of these contentions has merit.

**1. Ms. Hollandsworth's Expert Qualification**

[5] In the course of challenging the trial court's decision to allow Ms. Hollandsworth to present expert testimony, Defendant argues that Ms. Hollandsworth lacked the necessary credentials and failed to utilize an appropriate methodology. We disagree with both of Defendant's assertions.

"[E]xpert testimony is properly admissible when such testimony can assist the jury to draw certain inferences from facts because the expert is better qualified." *State v. Bullard*, 312 N.C. 129, 139, 322 S.E.2d 370, 376 (1984). In ruling upon a request to allow the admission of expert testimony, "the trial court must determine whether the expert's method of proof is sufficiently reliable as an area for expert testimony." *Howerton v. Arai Helmet, Ltd.*, 358 N.C. 440, 459, 597 S.E.2d 674, 686 (2004) (citing *State v. Goode*, 341 N.C. 513, 527-29, 461 S.E.2d 631, 639-40 (1995)). An "expert's testimony [does not have to be shown to be] conclusively reliable or indisputably valid before it can be admitted into evidence," since the credibility of and weight to be given to the expert's testimony is a question for the jury rather than the trial court. *Id.* at 460-61, 597 S.E.2d at 687-88. As a result of the fact that "the trial judge is afforded wide latitude of discretion when making a determination about the admissibility of expert testimony," *Bullard*, 312 N.C. at 140, 322 S.E.2d at 376, we review the trial court's decision to allow Ms. Hollandsworth to testify as an expert using an abuse of discretion standard of review. *State v. Parks*, 96 N.C. App. 589, 592, 386 S.E.2d 748, 750 (1989).

Ms. Hollandsworth clearly possessed the qualifications needed to present expert testimony. Among other things, Ms. Hollandsworth has earned a master's degree in Christian counseling and has completed additional professional training relating to the trauma experienced by children who have been subjected to sexual abuse. Ms. Hollandsworth is engaged in private practice as a therapist and is a licensed family therapist and professional counselor. According to Ms. Hollandsworth, over half of her clients have been subjected to some sort of trauma, with a significant number of these patients having suffered sexual abuse. As a result, the trial court had ample justi-

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fication for allowing Ms. Hollandsworth to testify as an expert witness. *State v. Love*, 100 N.C. App. 226, 233, 395 S.E.2d 429, 433 (1990) (holding that an individual with a master's degree in counseling who had counseled children suspected of having been sexually abused was properly qualified to present expert testimony), *disc. review denied*, 328 N.C. 95, 402 S.E.2d 423 (1991).

Although Defendant challenges the admission of Ms. Hollandsworth's testimony on reliability grounds, he has failed to demonstrate that the methods that she employed in the course of her work with Becky and Violet were unreliable. Instead, Defendant simply points to Ms. Hollandsworth's testimony to the effect that there is no way to tell whether any particular individual has been sexually abused based solely upon what he or she says and that different people respond to the experience of having been sexually abused in different ways. However, the appellate courts in this jurisdiction have consistently allowed the admission of expert testimony, such as that provided by Ms. Hollandsworth, which relies upon personal observations and professional experience rather than upon quantitative analysis. *See, e.g., State v. Kennedy*, 320 N.C. 20, 31-32, 357 S.E.2d 359, 366-67 (1987) (admitting testimony describing the symptoms exhibited by sexually abused children and opining that the alleged victims exhibited symptoms consistent with sexual abuse); *Love*, 100 N.C. App. at 233, 395 S.E.2d at 433 (1990) (holding that "[a]llowing experts to testify as to the symptoms and characteristics of sexually abused children and to state their opinions that the symptoms exhibited by the victim were consistent with sexual or physical abuse is proper"). As a result, having concluded that Defendant's challenges to Ms. Hollandsworth's credentials and the reliability of the methods that Ms. Hollandsworth employed lack merit, we hold that the trial court did not err by allowing Ms. Hollandsworth to testify as an expert witness.

## 2. Vouching for the Children's Credibility

[6] Secondly, Defendant argues that the trial court erred by allowing Ms. Hollandsworth to vouch for Becky and Violet's credibility. Once again, we do not find Defendant's argument persuasive.

On direct examination, the prosecutor asked Ms. Hollandsworth, "Is it common for children, especially younger children, who experience trauma of this nature to be unable or unwilling to tell a trusted family member even when they live in a loving home?" In response, Ms. Hollandsworth stated that:

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What research says is 60% of cases like this do not even get reported. And in my experience with clients, this is young to be even talking about it actually. Most of my cases people were after college age into young adulthood before they even talked about it. And, again, it goes back to that sense of guilt and shame. And this is common in literature and in what I've seen in my cases. That feeling of being bad or as if they participated. What research says is that the—

At this point, the trial court sustained an objection lodged by Defendant's trial counsel.

As we have already noted, a witness is not permitted to vouch for the credibility of the alleged victim in a child sexual abuse case. *State v. Aguallo*, 322 N.C. 818, 822, 370 S.E.2d 676, 678 (1988) (stating that “this Court has held it [to be] reversible error for medical experts to testify as to the veracity of the victim,” including situations in which “experts have testified that the victim was believable, had no record of lying, and had never been untruthful”) (citing *Aguallo*, 318 N.C. at 597-600, 350 S.E.2d at 81-82; *State v. Kim*, 318 N.C. 614, 619-21, 350 S.E.2d 347, 350-52 (1986); and *State v. Heath*, 316 N.C. 337, 340-44, 341 S.E.2d 565, 568-69 (1986)). According to Defendant, Ms. Hollandsworth improperly vouched for the credibility of Becky and Violet by describing child sexual abuse cases with which she was familiar as “cases like this.” We do not, however, believe that the challenged testimony constitutes impermissible vouching for the children's credibility.

The cases in which this Court and the Supreme Court have reversed convictions based upon the principle upon which Defendant relies generally involve testimony that directly comments on the credibility of the alleged victim or sets out the witness' subjective beliefs concerning the veracity of the alleged victim's allegations. *See, e.g., Aguallo*, 318 N.C. at 599, 350 S.E.2d at 81 (holding testimony that “I think she's believable” to be inadmissible); *State v. Keen*, 309 N.C. 158, 162, 305 S.E.2d 535, 537 (1983) (holding testimony “ “[t]hat an attack occurred on him; [] this was reality” to be inadmissible); *State v. Horton*, 200 N.C. App. 74, 78, 682 S.E.2d 754, 757-58 (2009) (holding testimony that, “ “[i]n all of my training and experience, when children provide those types of specific details it enhances their credibility” to be inadmissible). When read in context, Ms. Hollandsworth's testimony did not constitute a comment upon Becky and Violet's veracity. Ms. Hollandsworth never directly stated that

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Becky and Violet were believable. Instead, the challenged testimony describes the actions and reactions of sexual abuse victims in general and is devoid of any direct comment upon the credibility of the witnesses upon whom the State's case hinges. As a result, the trial court did not, contrary to Defendant's contention, allow Ms. Hollandsworth to vouch for the children's credibility in an impermissible manner.

E. Ineffective Assistance of Counsel

[7] Finally, Defendant contends that, if this Court concludes that any of the claims discussed above have not been properly preserved for appellate review, he is entitled to relief on ineffective assistance of counsel grounds. We disagree.

In analyzing ineffective assistance of counsel claims, we utilize a two-part test, under which the “[d]efendant must show (1) that ‘counsel’s performance was deficient,’ meaning it ‘fell below an objective standard of reasonableness,’ and (2) that ‘the deficient performance prejudiced the defense,’ meaning that ‘counsel’s errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.’” . . . In proving whether counsel’s actions resulted in prejudice to the defendant, he or she must demonstrate that “there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different[.]” with a “reasonable probability” being “a probability sufficient to undermine confidence in the outcome.”

*State v. Womack*, \_\_ N.C. App. \_\_, \_\_, 712 S.E.2d 193, 196 (2011) (quoting *State v. Mohamed*, 205 N.C. App. 470, 480-81, 696 S.E.2d 724, 733 (2010) (quoting *Strickland v. Washington*, 466 U.S. 668, 687-88, 104 S. Ct. 2052, 2064, 80 L. Ed. 2d 674, 693 (1984)), and 466 U.S. at 694, 104 S. Ct. at 2068, 80 L. Ed. 2d at 698). “If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, which we expect will often be so, that course should be followed.” *Strickland*, 466 U.S. at 697, 104 S. Ct. at 2069, 80 L. Ed. 2d at 699. In the event that an ineffective assistance of counsel claim cannot be properly evaluated “without such ancillary procedures as the appointment of investigators or an evidentiary hearing,” that claim should be dismissed “without prejudice to the defendant’s right to reassert [that claim] during a subsequent [motion for appropriate relief] proceeding.” *State v. Fair*, 354 N.C. 131, 166-67, 557 S.E.2d 500,

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524-25 (2001) (citations omitted), *cert. denied*, 535 U.S. 1114, 122 S. Ct. 2332, 153 L. Ed. 2d 162 (2002).

After carefully reviewing the record, we conclude that Defendant is not entitled to relief on the basis of any of the ineffective assistance of counsel claims that he has asserted in his brief. Having upheld the admission of Detective Curry's description of her meeting with Becky and the challenged portions of Ms. Hollandsworth's testimony on the merits, we conclude that Defendant has failed to establish that there were any deficiencies in the representation which he received from his trial counsel with respect to this evidence. *State v. Mewborn*, 200 N.C. App. 731, 738, 684 S.E.2d 535, 540 (2009) (citing *State v. Lee*, 348 N.C. 474, 492, 501 S.E.2d 334, 345 (1998)) (stating that "the failure to object to admissible evidence does not constitute an error which would satisfy the first prong of the *Strickland* test"). In addition, we cannot conclude, on the basis of the present record, that there is any reasonable probability that the outcome at Defendant's trial would have been different had his trial counsel persuaded the trial court to exclude Ms. M.'s expression of confidence in her daughters' truthfulness or to overrule the State's objection to the question inquiring about the extent of Defendant's cooperation with investigating officers. Finally, given that we do not know why Defendant's trial counsel elected to inquire about Detective Curry's confidence in Becky and Violet's veracity, we are unable, on the basis of the present record, to properly evaluate the validity of Defendant's challenge to the admission of the relevant portion of Detective Curry's testimony and dismiss Defendant's challenge to the representation which he received from his trial counsel with respect to the admission of that evidence without prejudice to his ability to assert that claim in a future motion for appropriate relief. As a result, Defendant is not entitled to relief from the trial court's judgments on ineffective assistance of counsel grounds.

### III. Conclusion

Thus, for the reasons set forth above, we conclude that none of Defendant's challenges to the trial court's judgments have merit. As a result, the trial court's judgments should, and hereby do, remain undisturbed.

No Error.

Chief Judge MARTIN and Judge DILLON concur.

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[225 N.C. App. 765 (2013)]

STATE OF NORTH CAROLINA  
v.  
NATHANIEL KENJIVO HATFIELD

No. COA 12-961

Filed 5 March 2013

**1. Appeal and Error—jury request to review testimony—no objection at trial—plain error review**

Defendant's argument regarding the jury's request to review certain testimony was reviewable for plain error even though defendant did not object at trial.

**2. Criminal Law—jury request to review testimony—failure to exercise discretion**

The trial court erred in a prosecution arising from an assault on defendant's wife by failing to exercise its discretion as required by N.C. Gen. Stat. § 15A-1233(a) when the jury asked to review the testimony of the wife. Even if no written transcript was available, the trial court still had the discretion to allow the jury to rehear the testimony.

**3. Criminal Law—jury request to review instructions—failure to exercise discretion—prejudicial**

The trial court's failure to exercise its discretion in response to a jury request to review testimony in a prosecution of an assault on defendant's wife was prejudicial.

Appeal by defendant from judgment entered 6 April 2011 by Judge Abraham Penn Jones in Wake County Superior Court. Heard in the Court of Appeals 10 December 2012.

*Attorney General Roy Cooper, by Assistant Attorney General Kimberly A. D'Arruda, for the State.*

*Irving Joyner for Defendant-appellant.*

HUNTER, JR., Robert N., Judge.

Nathaniel Kenjivo Hatfield ("Defendant") appeals from a judgment entered after a jury convicted him of: (i) two counts of assault by pointing a gun (N.C. Gen. Stat. § 14-34 (2011)) and (ii) one count of assault on a female (N.C. Gen. Stat. § 14-33(c)(2) (2011)). The trial court sentenced Defendant as a level II offender to: (i) a 75-day active

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sentence for assault on a female; and (ii) a 75-day suspended sentence with two years of supervised probation for the two assault by pointing a gun convictions. On appeal, Defendant contends the trial court erred by: (i) admitting testimony from Defendant's wife about Defendant's alleged threats to co-workers; (ii) admitting testimony from a police officer concerning whether Defendant was the aggressor; (iii) admitting testimony from Defendant's wife about the presence of unrelated martial arts weapons in Defendant's home; and (iv) refusing to exercise its discretion in considering the jury's request for a copy of Defendant's wife's testimony. Upon review, we vacate and remand for a new trial.

**I. Facts & Procedural History**

Defendant faced trial during the 4 April 2011 Criminal Session of Wake County Superior Court for: (i) two counts of assault by pointing a gun and (ii) one count of assault on a female. The State's evidence at trial tended to show the following facts.

On the night of 28 February 2010, Defendant and his wife, Elizabeth Hatfield ("Elizabeth"), argued in their living room over whether to allow their children to watch a particular movie. After Elizabeth's four-week-old baby son fell sleep in her arms around 11:00 P.M., she took the baby upstairs to his crib. Elizabeth and Defendant then went to their bedroom to sleep.

When they got into the bedroom, Elizabeth began putting pillow cases on the pillows. Defendant insisted he help, but Elizabeth said it was a one-person job. She suggested he eat and take his medication before bed. Defendant became angry with Elizabeth and told her to "shut the hell up." He then grabbed Elizabeth by the ears and shook her head, causing Elizabeth's glasses to fall. When Defendant released her, he turned and punched a three-inch hole in the wall.

At that point, the baby had awakened. Elizabeth went into the baby's bedroom to soothe him back to sleep. Defendant followed Elizabeth into the baby's bedroom. He continued to yell at her and punched the baby's bedroom wall, leaving a dent. He also shook the baby's crib so violently Elizabeth thought it would break. Defendant then pulled out a black semi-automatic Beretta 9MM pistol, showed Elizabeth a bullet, and asked her if she thought the gun and the bullet were real. When she responded affirmatively, Defendant loaded the bullet into the gun's magazine. Defendant then alternated between pointing the gun at Elizabeth's head and the baby's head.



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During this display, Defendant said he wanted to leave Elizabeth and that he would rather see their children in heaven than with her.

Defendant then grabbed Elizabeth by the throat and threw her on the bed. Defendant pinned down Elizabeth's arms and legs so she could not move. When he finally got up, Elizabeth immediately called 911. The police arrived at 1:00 A.M. on 1 March 2010. Officer Lindsay Wygonik ("Officer Wygonik"), the first officer to arrive, investigated the scene and questioned both Defendant and Elizabeth. She then arrested Defendant for three offenses: (i) assault by pointing a gun at Elizabeth; (ii) assault by pointing a gun at the baby; and (iii) assault on a female for pinning Elizabeth down and shaking her head.

Defendant's trial occurred during the 4 April 2011 Criminal Session of Wake County Superior Court. The State called Elizabeth and Officer Wygonik to testify. In addition to the facts discussed previously, Elizabeth testified Defendant had said "some pretty nasty things" about co-workers at IBM and that IBM "ended up filing a restraining order against him." Additionally, Elizabeth testified Defendant kept numerous martial arts weapons in their home.

Officer Wygonik then testified. On direct examination, the State asked Officer Wygonik why she charged Defendant with the three crimes. She replied that "Mr. Hatfield was the primary aggressor in the situation, and with what Mr. Hatfield told me in relation to the guns, in my four years of experience, [it is] very unusual for anyone to handle a firearm during an argument for any reason." Defendant did not object to this testimony.

Defendant then took the stand and denied ever grabbing his wife, punching the walls, or pointing a gun at his wife or child. At the close of all the evidence, the trial court instructed the jury and sent it to deliberate. During deliberation, the jury asked to "hear a reading of Elizabeth's sworn testimony." In response, the trial judge told the jury:

We can't do that because we haven't done daily copy and so you have to rely on your best recollection among the 12 of you of what it was. To do daily copy is quite expensive and so you may have seen that on TV, but that's not how we do it.

The jury was then sent back to resume its deliberations.

On 6 April 2011, the jury returned a verdict finding Defendant guilty of all three charges. Defendant was sentenced to: (i) an active

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sentence of 75 days imprisonment for assault on a female and (ii) a suspended sentence of 75 days with supervised probation for two years for the two convictions for assault by pointing a gun. On 14 April 2011, Defendant filed timely notice of appeal.

**II. Jurisdiction & Standard of Review**

This Court has jurisdiction to hear the instant case pursuant to N.C. Gen. Stat. § 7A-27(b) (2011) and § 15A-1444(a) (2011) (“A defendant who has entered a plea of not guilty to a criminal charge, and who has been found guilty of a crime, is entitled to appeal as a matter of right when final judgment has been entered.”).

Defendant’s arguments regarding (i) the admission of Elizabeth’s testimony about his threats to IBM; (ii) the admission of Elizabeth’s testimony about other martial arts weapons in the house; and (iii) the admission of Officer Wygonik’s testimony that Defendant was the first aggressor were not preserved at trial and thus are only reviewable for plain error. *See* N.C. R. App. P. 10(a)(4) (“[A]n issue that was not preserved by objection . . . at trial and . . . not deemed preserved by rule or law without any such action nevertheless may be made the basis of an issue presented on appeal when the judicial action questioned is specifically and distinctly contended to amount to plain error.”); *see also State v. Goss*, 361 N.C. 610, 622, 651 S.E.2d 867, 875 (2007) (holding that the defendant’s argument was waived when he failed to “specifically and distinctly” assign plain error to a trial court’s ruling); *State v. Gregory*, 342 N.C. 580, 584, 467 S.E.2d 28, 31 (1996) (holding that courts will only “review . . . unpreserved issues for plain error when they involve either (1) errors in the judge’s instructions to the jury, or (2) rulings on the admissibility of evidence.”).

Plain error arises when an error is “so basic, so prejudicial, so lacking in its elements that justice cannot have been done.” *State v. Odom*, 307 N.C. 655, 660, 300 S.E.2d 375, 378 (1983) (quotation marks and citation omitted). To prevail under plain error review, a “defendant must convince this Court not only that there was error, but that absent the error, the jury probably would have reached a different result.” *State v. Jordan*, 333 N.C. 431, 440, 426 S.E.2d 692, 697 (1993).

**[1]** Defendant’s argument regarding the jury’s request for Elizabeth’s testimony is reviewable even though Defendant did not object at trial. *See* N.C. Gen. Stat. § 15A-1233(a) (2011); *State v. Starr*, 365 N.C. 314, 317, 718 S.E.2d 362, 365 (2011) (holding that the “alleged error is preserved by law even when the defendant fails to object”); *State v. Ashe*, 314 N.C. 28, 40, 331 S.E.2d 652, 659 (1985) (“[F]ailure of the trial

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court to comply with [this] statutory [mandate] entitles [D]efendant to press [this] point[] on appeal, notwithstanding a failure to object at trial.”). Still, Defendant must “demonstrate that there is a reasonable possibility that a different result would have been reached had the trial court’s error not occurred.” *State v. Nobles*, 350 N.C. 483, 506, 515 S.E.2d 885, 899 (1999).

**III. Analysis**

On appeal, Defendant argues the trial court erred by: (i) admitting Elizabeth’s testimony about Defendant’s alleged threats to co-workers; (ii) admitting Officer Wygonik’s testimony that Defendant was the aggressor; (iii) admitting Elizabeth’s testimony about the presence of unrelated martial arts weapons found in Defendant’s home; and (iv) failing to exercise its discretion when the jury asked to review Elizabeth’s testimony. Because we vacate the trial court’s judgment and remand for new trial based on Defendant’s fourth argument, we address that issue first.

N.C. Gen. Stat. § 15A-1233(a) provides:

If the jury after retiring for deliberation requests a review of certain testimony or other evidence, the jurors must be conducted to the courtroom. The judge in his discretion, after notice to the prosecutor and defendant, may direct that requested parts of the testimony be read to the jury and may permit the jury to reexamine in open court the requested materials admitted into evidence. In his discretion the judge may also have the jury review other evidence relating to the same factual issue so as not to give undue prominence to the evidence requested.

N.C. Gen. Stat. § 15A-1233(a) (2011). Therefore, the statute:

imposes two duties upon the trial court when it receives a request from the jury to review evidence. First, the court must conduct all jurors to the courtroom. Second, the trial court must exercise its discretion in determining whether to permit requested evidence to be read to or examined by the jury.

*Ashe*, 314 N.C. at 34, 331 S.E.2d at 656. In sum, the “issue is whether the trial court exercised its discretion as required by [the statute].” *State v. Barrow*, 350 N.C. 640, 646, 517 S.E.2d 374, 378 (1999) (citations omitted).

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The test to determine whether a defendant should receive a new trial due to the trial court's failure to exercise discretion has two parts. First, we "must consider if the trial court failed to exercise its discretion. If the trial court did indeed fail to exercise its discretion, this would constitute error." *State v. Long*, 196 N.C. App. 22, 28, 674 S.E.2d 696, 700 (2009) (internal citation omitted). Our Supreme Court has held that "[w]hen the trial court gives no reason for a ruling that must be discretionary," the reviewing court will presume "that the court exercised its discretion." *Starr*, 365 N.C. at 318, 718 S.E.2d at 365. But, "where the statements of the trial court show that the trial court did not exercise discretion," the "presumption is overcome, and the denial is deemed erroneous." *Id.* (quotation marks omitted and citation omitted).

Second, we must "consider whether this error was prejudicial." *Long*, 196 N.C. App. at 28, 674 S.E.2d at 700. The error is prejudicial if the testimony was "material to the determination of [the] defendant's guilt or innocence." *State v. Johnson*, 346 N.C. 119, 126, 484 S.E.2d 372, 377 (1997) (quotation marks and citation omitted). Testimony is material if "the defendant can show that (1) such testimony or evidence involved issues of some confusion and contradiction, and (2) it is likely that a jury would want to review such testimony." *State v. Johnson*, 164 N.C. App. 1, 20, 595 S.E.2d 176, 187 (2004) (quotation marks and citation omitted). If the defendant satisfies this requirement, we will determine the error was prejudicial because there exists "a reasonable possibility that, had the error in question not been committed, a different result would have been reached at the trial out of which the appeal arises." N.C. Gen. Stat. § 15A-1443(a) (2011).

In the present case, Defendant argues: (i) the trial court failed to exercise its discretion regarding the jury's request to review Elizabeth's testimony, and (ii) this error was prejudicial. We agree.

**A. Failure to Exercise Discretion**

**[2]** Here, the trial court failed to exercise its discretion in considering the jury's request.

A similar situation was addressed by our Supreme Court in *Barrow*, 350 N.C. 640, 517 S.E.2d 374. In *Barrow*, the defendant was convicted of first-degree murder. *Id.* at 641, 517 S.E.2d at 375. On appeal, he contended the trial court erred by "failing to affirmatively exercise its discretion" under section 15A-1233(a) when responding to the jury's request to review testimony. *Id.* at 645, 517 S.E.2d at 377.

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There, the trial court said it “doesn’t have the ability to now present to you the transcription of what was said during the course of the trial.” *Id.* at 647, 517 S.E.2d at 378.

In *Barrow*, our Supreme Court held the statement “suggests a failure to exercise discretion” and the “response could be interpreted as a statement that the trial court did not believe that it had the discretion to consider the jury’s request.” *Id.* The *Barrow* court distinguished that case from others where the trial court had actually exercised its discretion to refuse the jury’s request. *See id.* at 647-48, 517 S.E.2d at 379 (“[T]he trial court stated that it did not have the *ability* to present the transcript to the jury, indicating a failure to exercise discretion.”); *Ashe*, 314 N.C. at 35, 331 S.E.2d at 656 (holding that it was error for the trial court to respond to the jury’s request simply by saying “[t]here is no transcript at this point.”); *State v. Lang*, 301 N.C. 508, 511, 272 S.E.2d 123, 125 (1980) (holding that the trial court’s “comment to the jury that the transcript was *not available* to them was an indication that he did not exercise his discretion” and that such “denial of the jury’s request as a matter of law was error.”).

The instant case is closely analogous to *Barrow*, *Ashe* and *Lang*. Here, after the jury requested Elizabeth’s testimony, the trial court simply told the jury “[w]e can’t do that.” Like in *Barrow*, *Ashe* and *Lang*, this statement suggests the trial court did not have discretion to grant the jury’s request. However, even if no written transcript was available, the trial court still had the discretion to allow the jury to rehear the testimony. *See, e.g., Ashe*, 314 N.C. at 35 n.6, 331 S.E.2d at 657 n.6 (“The existence of a transcript is . . . not a prerequisite to permitting review of testimony. The usual method . . . is to let the court reporter read to the jury his or her notes under the supervision of the trial court . . .”).

Consequently, we hold the trial court erred by failing to exercise its discretion as required by N.C. Gen. Stat. § 15A-1233(a). Although we do not decide whether the trial court should have granted the jury’s request, the trial court must clearly exercise its discretion. *See Starr*, 365 N.C. at 319, 718 S.E.2d at 366 (holding that although the “trial court is not required to state a reason for denying access to the transcript,” it must at least say “ ‘In the exercise of my discretion, I deny the request,’ and instruct the jury to rely on its recollection of the trial testimony.”(citation omitted)).

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**B. Prejudicial Error**

**[3]** Having concluded the trial court erred, we now consider whether this error was prejudicial. *See Long*, 196 N.C. App. at 28, 674 S.E.2d at 700 (citation omitted).

Error is prejudicial if it involves testimony that is “material to the determination of [the] defendant’s guilt or innocence.” *Starr*, 365 N.C. at 319, 718 S.E.2d at 366 (quotation marks and citation omitted); *see also Johnson*, 346 N.C. at 126, 484 S.E.2d at 377; *Ashe*, 314 N.C. at 38, 331 S.E.2d at 658; *Lang*, 301 N.C. at 511, 272 S.E.2d at 125; *State v. Hanible*, 94 N.C. App. 204, 206, 379 S.E.2d 696, 698 (1989); *State v. Helms*, 93 N.C. App. 394, 401, 378 S.E.2d 237, 241 (1989). Testimony is material if “the defendant can show that (1) such testimony or evidence involved issues of some confusion and contradiction, and (2) it is likely that a jury would want to review such testimony.” *Johnson*, 164 N.C. App. at 20, 595 S.E.2d at 187 (quotation marks and citation omitted). *See also Starr*, 365 N.C. at 319, 718 S.E.2d at 366 (holding that error is prejudicial if the defendant shows “‘a reasonable possibility that, had the error in question not been committed, a different result would have been reached at the trial out of which the appeal arises’” (citation omitted)). Our Supreme Court has previously held that a jury is likely to want to review testimony that is “the only evidence directly linking defendant to the alleged crimes.” *Johnson*, 346 N.C. at 126, 484 S.E.2d at 377.

Here, Defendant directly contradicted Elizabeth’s testimony at trial. Specifically, Defendant testified he never grabbed his wife, punched the walls, or pointed a gun at his wife and baby. Therefore, Elizabeth’s testimony satisfies the first prong of the *Johnson* test. *See Long*, 196 N.C. App. at 40–41, 674 S.E.2d at 707 (holding that when testimony of a victim and a defendant was “contradicting,” the trial court committed prejudicial error by refusing the jury’s request to review the testimony).

Furthermore, it is likely the jury would have wanted to review Elizabeth’s testimony because Elizabeth was the only eyewitness to Defendant’s alleged crimes. *See, e.g., Johnson*, 346 N.C. at 126, 484 S.E.2d at 377 (holding the requested evidence was “clearly material to the determination of [the] defendant’s guilt or innocence” because it “was the only evidence directly linking defendant to the alleged crimes”) (quotation marks and citation omitted); *Lang*, 301 N.C. at 511, 272 S.E.2d at 125 (holding that testimony from an alibi witness was material when the defendant’s only defense was his alibi). Thus,

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Elizabeth's testimony was material to the determination of Defendant's guilt or innocence because it was the "only evidence directly linking [D]efendant to the alleged crimes." *See Johnson*, 346 N.C. at 126, 484 S.E.2d at 377.

Therefore, we hold the trial court's failure to exercise its discretion under N.C. Gen. Stat. § 15A-1233(a) was prejudicial. First, Defendant directly contradicted Elizabeth's testimony at trial. Second, Elizabeth was the only eyewitness to his alleged crimes. Consequently, we vacate the trial court's judgment and remand for new trial. As we vacate and remand based on Defendant's fourth argument, we need not address his other arguments. *See Long*, 196 N.C. App. at 41, 674 S.E.2d at 707 ("As we are granting defendant's request for a new trial, and the other issues he has raised may not be repeated in a new trial, we will not address his other assignments of error.").

**IV. Conclusion**

We conclude the trial court erred by failing to exercise its discretion in responding to the jury's request for Elizabeth's testimony. Moreover, this error was prejudicial because the testimony was material to the determination of Defendant's guilt or innocence. Therefore, we vacate the trial court's judgment and remand for new trial.

NEW TRIAL.

Chief Judge MARTIN and Judge ERVIN concur.

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STATE OF NORTH CAROLINA v. SHELTON DARREL MILLS

No. COA12-855

Filed 5 March 2013

**1. Jury—selection—prima facie case of discrimination—Batson hearing**

The trial court did not err in a murder case by failing to conduct a *Batson* hearing where defendant failed to establish a *prima facie* case of discrimination.

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**2. Evidence—hearsay—statements made by deceased—then existing mental condition—admissible**

The trial court did not err in a murder case by admitting alleged hearsay statements one of the deceased victims had made to her sister-in-law. The statements were admissible to show the victim's then existing mental, emotional, or physical condition pursuant to N.C.G.S. § 8C-1, Rule 803(3). Furthermore, defendant did not make any argument concerning how the alleged error prejudiced him.

**3. Appeal and Error—preservation of issues—no prejudice**

Defendant failed to preserve for appellate review the argument that the trial court erred in a murder case by failing to instruct the jury on the potential interest of one of the witnesses who was testifying under the hope of a sentence reduction. Even assuming, arguendo, that defendant had properly preserved this argument, the evidence of defendant's guilt was overwhelming and defendant could not demonstrate prejudice.

Appeal by Defendant from judgments entered 31 May 2011 by Judge Alma L. Hinton in Superior Court, Pitt County. Heard in the Court of Appeals 28 January 2013.

*Attorney General Roy Cooper, by Special Deputy Attorney General Richard L. Harrison, for the State.*

*Brock, Payne & Meece, P.A., by C. Scott Holmes, for Defendant.*

McGEE, Judge.

Shelton Darrel Mills (Defendant) had been in a relationship with Cylvonnia Preddy Crowder (Crowder) that soured. According to the trial testimony of Crowder's sister-in-law, Ursula Preddy (Preddy), Defendant became jealous and harassed Crowder. Crowder told Preddy she had ended her relationship with Defendant, but that he continued "harassing her and calling her and coming past her house and coming to the job." Crowder began a relationship with Robert Bizzell (Bizzell). Crowder told Preddy that Defendant was still bothering her, and that she needed to change her phone number. Defendant had threatened to "get her." Crowder told Preddy she was scared of Defendant.

A 911 call was received at 1:09 a.m. on 26 August 2007 from Crowder's residence. When the Pitt County Sheriff's Office responded,



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Crowder was found dead on the floor of her home with a phone next to her. She had been shot in the head and chest, and there was “blood all over the place.” Blood was found throughout the house, including in the bathroom sink and the bathtub. Bizzell’s body was found by a gate in the yard. He had gunshot wounds in his chest and abdomen.

At the time of the shootings, Tantelane Moseley (Moseley) was in a relationship with Defendant. At around 12:50 a.m. on 26 August 2007, Defendant asked to borrow Moseley’s car to go to the convenience store and he returned between 1:20 and 1:30 a.m. Moseley testified to the following:

[When Defendant returned], he was all, you know, like he had been in a altercation. He was nervous and was, you know, upset, you know, like he was running from something or whatever.

Q. Had you seen him like that before?

A. No. No. I haven’t.

Q. And then what happened?

A. And I asked him what was wrong, and he was like he got to leave. He need to leave. And he asked me would I, you know, take him out of town. I was like no, because my children here, and I—you know, my kids was in the room asleep, so—and he like pulled me by arm and we left. We left, and he was driving my car, and—

Q. And do you recall what he was wearing at that point?

A. He had on the gold shirt, still a gold shirt and some—his jeans and—and his [Timberland] boots.

Q. Okay. I’m sorry to interrupt you. And then what happened after he grabbed you by the arm?

A. Okay. And so he was—I was like—What happened? What’s wrong?

He was like—he was—I asked him what took him so long. At first I asked him what took him so long getting back from the store, and he was like he went across the creek.

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I was like—Why you go across the creek? And he was like he went to—there to, you know, be with his cousins or whatever, and—and he said while he was over there he got into a argument with a guy, and they was fighting and he had shot him in the leg.

Agent Elliot Smith (Agent Smith) of the State Bureau of Investigation (SBI) was assigned as the lead investigator. After speaking with relatives of Crowder and Bizzell, Agent Smith became interested in interviewing Defendant. Defendant agreed to meet Agent Smith and supervising SBI Agent John C. Rea (Agent Rea) at the Winterville Police Department. Defendant then rode with Agent Rea to the SBI office in Greenville. During the drive to Greenville, Defendant told Agent Rea that he had checked with the magistrate's office and the sheriff's office to see if any warrants had been taken out on him. Agent Rea noticed what looked like "blood spatter" on Defendant's jeans. Defendant asked Agent Rea if he (Defendant) was going to die. Agent Rea asked Defendant if he was referring to the death penalty, and Defendant answered that he was. Defendant asked Agent Rea if he could guarantee that Defendant would not get the death penalty, and Agent Rea said he could not guarantee that. Defendant was crying throughout this conversation.

Agents Rea and Smith interviewed Defendant at the SBI office the morning of the shootings. According to Agent Rea, Defendant first stated that he wanted the agents to know that he "thought a lot of her [Crowder]." According to Agent Rea,

[Defendant] indicated that he'd gone to [Crowder's] house. He wanted to see her. He went to the door, and he referred to Mr. Bizzell as the boyfriend. Said the boyfriend came to the door. He told the boyfriend or Mr. Bizzell that he wanted to speak to [Crowder].

[Defendant] said that the boyfriend said—she's in the shower. I'll go and get her. [Defendant] said that the boyfriend left the front door. He stepped inside the house.

Q. Who?

A. [Defendant] stepped inside the house. [Crowder] came out of the bathroom with a towel wrapped around her, and [Defendant] then said the boyfriend kept pushing up behind her, kept pushing up behind her, and then he said—I can't talk about it anymore.

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He then—the other thing he said, he told me—says he’s not trying to be hard to get along with. He just had a lot of things going through his mind at that time.

Defendant stopped talking about the events of that morning, and Agents Rea and Smith arrested Defendant and charged him with the murders. Agent Smith collected the clothes Defendant was then wearing, which included a pair of blue jeans, a black t-shirt, and a pair of Timberland boots.

Defendant was detained in the Pitt County Detention Center. A fellow detainee, John Newkirk (Newkirk), testified at trial. Newkirk stated he had played cards with Defendant daily, and that Defendant had told him that he had killed his girlfriend and the guy with whom she was “messaging around[.]”

Defendant’s jeans were sent to the SBI crime lab for DNA testing. Results showed that some of the blood on Defendant’s jeans came from Crowder, and some of the blood came from Bizzell.

Defendant’s evidence consisted of the testimony of two of Defendant’s family members and a psychiatrist, all of whom testified that Defendant was mentally impaired and incapable of fully functioning in society. Defendant’s evidence appeared to be mainly directed at challenging the State’s argument that the murders were first-degree, based upon premeditation and deliberation. As part of the closing argument, one of Defendant’s attorneys told the jury:

Shelton Mills is mentally retarded. He’s intellectually impaired, and he’s seriously mentally ill. His mental problems impair him in basic ways that have profound effects on his ability to function in his daily life. He’s affected cognitively and volitionally. He’s not normal like most of us are.

We’re here today because of Shelton’s mental, intellectual, social, and functional retardations and mental disorder. We’ve told you consistently in this trial one thing, really, that Shelton Mills is not guilty of first-degree murder. If you boil it down, that’s what we’ve been saying. And you say it different ways in [c]ourt, but you know, in [c]ourt there are ways you can say things, and there are ways you are supposed to say things, and you have to go at it—use certain words at certain times

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and—but that’s what it boils down to. We’re saying he’s not guilty of first-degree murder.

And that in no way diminishes the loss of the people here. We’re not here valuing lives. That’s what happens in civil court sometimes. We wish we could turn back the hands of time and make it so any of this happened [sic], but no one of us have that power, and it’s not in any way to diminish any loss here. There’s severe loss.

The jury found Defendant guilty on two counts of first-degree murder, based upon malice, premeditation and deliberation and felony murder. The jury found Defendant guilty of first-degree burglary, and used that conviction as the underlying felony for felony murder. Defendant was also convicted of possession of a firearm by a felon. Defendant was sentenced to two consecutive life terms without the possibility of parole plus 117 to 150 months. Defendant appeals.

## I.

Defendant’s arguments on appeal are whether: (1) the trial court failed to hold a *Batson* hearing after Defendant established a *prima facie* case of discrimination, (2) the trial court erroneously admitted hearsay statements and, (3) the trial court erroneously failed to instruct the jury on the potential interest one of the State’s witnesses had in providing testimony favorable to the State.

## II.

[1] In Defendant’s first argument, he contends the trial court erred by failing to conduct a *Batson* hearing after he had established a *prima facie* case of discrimination. We disagree.

The Equal Protection Clause of the Fourteenth Amendment to the United States Constitution and Article I, Section 26 of the Constitution of North Carolina forbid the use of peremptory challenges for a racially discriminatory purpose. *Batson v. Kentucky*, 476 U.S. 79, 89, 90 L. Ed. 2d 69, 83 (1986). In *Batson*, the United States Supreme Court set out a three-part test to determine whether a prosecutor impermissibly used peremptory challenges to excuse prospective jurors on the basis of race, and we have adopted this test[.] First, the defendant must make a *prima facie* showing that the prosecutor exercised a peremptory challenge on the basis of race. If such a showing is made, the prosecutor

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is required to offer a facially valid and race-neutral rationale for the peremptory challenge or challenges. Finally, the trial court must decide whether the defendant has proven purposeful discrimination.

*State v. Barden*, 356 N.C. 316, 342, 572 S.E.2d 108, 126 (2002) (citations omitted).

“Where the trial court rules that a defendant has failed to make a *prima facie* showing, our review is limited to whether the trial court erred in finding that defendant failed to make a *prima facie* showing, even if the State offers reasons for its exercise of the peremptory challenges.”

*Barden*, 356 N.C. at 343, 572 S.E.2d at 127 (citations omitted).

“Since the trial judge’s findings . . . largely will turn on evaluation of credibility, a reviewing court ordinarily should give those findings great deference.” Our appellate courts accord great deference in reviewing the trial court’s ruling on the establishment of a *prima facie* case. The trial court’s ultimate *Batson* decision “will be upheld unless the appellate court is convinced that the trial court’s determination is clearly erroneous.”

To review defendant’s claim that the trial court erred in ruling that he had failed to establish a *prima facie* case of intentional discrimination, we consider the following factors:

“[(1)] whether the ‘prosecutor used a disproportionate number of peremptory challenges to strike African-American jurors in a single case;’ [(2)] whether the defendant is a ‘member of a cognizable racial minority;’ . . . [(3)] whether the state’s challenges appear to have been motivated by racial discrimination; . . . [(4)] ‘the victim’s race[;] [(5)] the race of the State’s key witnesses[;]’ and [(6)] ‘whether the prosecutor made racially motivated statements or asked racially motivated questions of black prospective jurors . . . that raise[d] an inference of discrimination.’ ”

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*State v. Mays*, 154 N.C. App. 572, 576, 573 S.E.2d 202, 205 (2002) (citations omitted). “Because the trial court considers all relevant circumstances including the demeanor and questions and answers of both the prosecutor and the excused jurors, we must give the court’s judgment deference.” *State v. Williams*, 343 N.C. 345, 359, 471 S.E.2d 379, 387 (1996) (citation omitted).

Defendant contends that, at the time of his objection, the State had accepted one African American juror and used peremptory challenges to exclude three, while it had accepted sixteen white jurors and used peremptory challenges to exclude four. Defendant is correct that, at the time Defendant objected, the State’s acceptance rate, excluding jurors dismissed for cause, was twenty-five percent for African American potential jurors, and eighty percent for white potential jurors. While numerical analysis of the peremptory challenges used may be useful in the *Batson* analysis, it is not dispositive. *Barden*, 356 N.C. at 344, 572 S.E.2d at 127. In the present case, Defendant does not argue that any other factors supporting a *prima facie* case of intentional discrimination were present, and our review of the record reveals none. In the present case, perhaps most importantly, Defendant and both Crowder and Bizzell were African American. In addition, the State questioned all the prospective jurors in the same manner, and there were no racially motivated comments made or questions asked during jury selection, and the responses of the prospective jurors provided reasonable justification for exclusion. *Mays*, 154 N.C. App. at 576, 573 S.E.2d at 205; *Williams*, 343 N.C. at 359, 471 S.E.2d at 387.

Three prospective African American jurors were peremptorily excused by the State prior to Defendant’s objection. The first stated that he had had unpleasant encounters with law enforcement, and he had reservations about the death penalty because of its “misapplication.” The second stated that he might lose his driver’s license due to a DWI and would have trouble making it to court. The third stated that serving would be a hardship because she would miss work and would not get paid.

We stress there is no bright-line rule with respect to the percentage of prospective jurors of a particular race or class that are accepted or the percentage excluded through peremptory challenges. We must consider all the relevant factors. *Mays*, 154 N.C. App. at 576, 573 S.E.2d at 205. In the present case, after considering all the relevant factors, we are not convinced that the trial court’s determination was clearly erroneous. *Id.* This argument is without merit.

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[225 N.C. App. 773 (2013)]

## III.

[1] In Defendant's second argument, he contends the trial court erred by admitting hearsay statements Crowder made to Preddy. We disagree.

The State sought to introduce the contested testimony pursuant to, *inter alia*, Rule 803(3) of the North Carolina Rules of Evidence:

The following are not excluded by the hearsay rule, even though the declarant is available as a witness:

....

**Then Existing Mental, Emotional, or Physical Condition.**—A statement of the declarant's then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain, and bodily health), but not including a statement of memory or belief to prove the fact remembered or believed[.]

N.C. Gen. Stat. § 8C-1, Rule 803 (2011). “ ‘Evidence tending to show the victim's state of mind is admissible so long as the victim's state of mind is relevant to the case at hand.’ ” *State v. Bishop*, 346 N.C. 365, 379, 488 S.E.2d 769, 776 (1997) (citation omitted).

“The victim's state of mind is relevant if it bears directly on the victim's relationship with the defendant at the time the victim was killed.” Moreover, we have also stated that “a victim's state of mind is relevant if it relates directly to circumstances giving rise to a potential confrontation with the defendant.”

*State v. King*, 353 N.C. 457, 477, 546 S.E.2d 575, 591 (2001) (citations omitted). “ ‘Accordingly, the statements [concerning the relationship between the victim and defendant] are admissible not as a recitation of facts but to show the victim's state of mind.’ ” *State v. Hernandez*, 202 N.C. App. 359, 362, 688 S.E.2d 522, 524 (2010) (citation omitted).

The contested testimony of Preddy involved the relationship between Defendant and Crowder, and statements by Crowder that Defendant was harassing her and had threatened her. Defendant makes the conclusory statement that “[t]he statements of . . . Crowder to [Preddy] all constituted statements of memory to prove a fact remembered and is [sic] thus not within North Carolina

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Rule of Evidence 803(3).” In his brief, Defendant does not argue why we should find this to be true, nor does Defendant cite to any authority supporting this conclusory statement. Having reviewed the law and the facts of this argument, we hold that the trial court did not err in admitting Preddy’s testimony pursuant to Rule 803(3).

Furthermore, Defendant does not make any argument concerning how any alleged error prejudiced him. Defendant erroneously states that it is the State’s burden to prove any error was harmless beyond a reasonable doubt. It is true that Defendant’s trial counsel made an objection at trial based upon constitutional grounds—Defendant’s sixth amendment right to confront witnesses against him. An objection on constitutional grounds is, in itself, insufficient. Defendant must show on appeal that one of Defendant’s constitutional rights has been abridged.

However, on appeal, Defendant admits that Crowder’s statements to Preddy were not testimonial, and were “not controlled by *Crawford v. Washington*.” Defendant has made no compelling argument that his constitutional right to confront witnesses against him was denied. This Court has recently stated:

“Evidence tending to show a declarant’s state of mind is an exception to the hearsay rule. . . . [T]he failure of a trial court to admit or exclude this evidence will not result in the granting of a new trial absent a showing by defendant that a reasonable possibility exists that a different result would have been reached absent the error.”

*Hernandez*, 202 N.C. App. at 362-63, 688 S.E.2d at 524-25 (citations omitted).

Even assuming, *arguendo*, Preddy’s testimony was admitted in error, Defendant has failed in his burden of showing that a reasonable probability existed that, absent this evidence, a different result would have been reached at trial. Defendant’s trial strategy did not appear to be forcibly contesting that Defendant committed the murders. Defendant’s trial strategy appeared to be directed at showing that Defendant was mentally impaired and thus incapable of premeditation and deliberation. Further, Defendant does not challenge his conviction for first-degree burglary, and Defendant was also convicted on two counts of first-degree murder pursuant to the felony murder rule. This argument is without merit.



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[225 N.C. App. 773 (2013)]

## IV.

[3] In Defendant's final argument, he contends that the trial court erred by failing "to instruct the jury on the potential interest of [Newkirk,] who was testifying under the hope of a sentence reduction[.]" We disagree.

Defendant has not preserved this argument for appellate review. Defendant argues that, during the course of the trial, he requested an instruction concerning potential interest Newkirk might have had in the outcome of the trial. Specifically, Defendant states that Newkirk was testifying for the State "under the hope of a reduction of federal sentence." Defendant contends the trial court refused to give the requested instruction during Newkirk's testimony, but indicated that it would give the instruction at the close of the trial. The trial court never gave the requested instruction during the charge conference, and Defendant neither requested it again, nor objected to its omission.

Initially, Defendant does not include any part of Newkirk's testimony in his brief and, therefore, has not, and cannot, make any argument as to how this testimony, absent the requested instruction, might have prejudiced him. It is not the job of this Court to make Defendant's argument for him.

In addition, though Defendant includes the standard of review for plain error in the first part of his argument, Defendant never contends that the trial court committed plain error, nor does Defendant request that we review this alleged error for plain error. "In criminal cases, an issue that was not preserved by objection noted at trial . . . nevertheless may be made the basis of an issue presented on appeal when the judicial action questioned is specifically and distinctly contended to amount to plain error." N.C.R. App. P. 10(a)(4). This argument has been abandoned. N.C.R. App. P. 28(b)(6) ("Issues not presented in a party's brief, or in support of which no reason or argument is stated, will be taken as abandoned.").

Even assuming, *arguendo*, that Defendant had properly preserved this argument at trial and on appeal, the evidence that Defendant shot Crowder and Bizzell, even absent Newkirk's testimony, is overwhelming. Defendant cannot demonstrate prejudice.

No error.

Chief Judge MARTIN and Judge CALABRIA concur.

**STATE v. MORGAN**

[225 N.C. App. 784 (2013)]

STATE OF NORTH CAROLINA

v.

TRAVIS DOUGLAS MORGAN

No. COA12-889

Filed 5 March 2013

**1. Criminal Law—denial of motion to dismiss—no written findings**

The trial court's failure to make written findings when denying defendant's motion to dismiss resulted in the remand of convictions for statutory rape and indecent liberties. While the trial court provided from the bench its rational for concluding that defendant's written statement was not rendered involuntary by injuries or painkillers, there was a material conflict in the evidence concerning a promise of leniency in exchange for the statement that the trial court did not address.

**2. Indictment and Information—statutory rape—carnal knowledge—common understanding**

An indictment for statutory rape that alleged that defendant did "carnally know" the victim alleged all material elements of the crime charged, even though the statute referred to "vaginal intercourse." At common law "carnal knowledge" and "sexual intercourse" are synonymous and a person of common understanding would know that the indictment alleged an act of vaginal intercourse.

**3. Rape—statutory—indictment—language**

An indictment for statutory rape was sufficient where it alleged all of the material elements of N.C.G.S. § 14-27.7A. The indictment was not insufficient because it did not contain the language "by force and against her will"; N.C.G.S. § 15-144.1 does not apply to the statutory rape of a child 13, 14, or 15 years old.

Appeal by defendant from judgment entered 1 March 2012 by Judge Anderson Cromer in Moore County Superior Court. Heard in the Court of Appeals 11 December 2012.

*Attorney General Roy Cooper, by Assistant Attorney General Anita LeVeaux, for the State.*

**STATE v. MORGAN**

[225 N.C. App. 784 (2013)]

*Appellate Defender Staples Hughes, by Assistant Appellate Defender David W. Andrews, for defendant-appellant.*

HUNTER, Robert C., Judge.

Travis Douglas Martin (“defendant”) appeals from judgment entered in Moore County Superior Court upon return of a jury verdict finding him guilty of statutory rape of a 15-year-old girl and indecent liberties with a child. On appeal, defendant argues that: (1) the trial court erred by failing to enter written factual findings and conclusions of law in its denial of defendant’s motion to suppress, and (2) the trial court lacked jurisdiction to enter its judgment due to defects in the indictment. After careful review, we find no error in the indictment but remand to the trial court for entry of a written order on defendant’s motion to suppress.

**Background**

The evidence at trial established the following facts. On 17 June 2010, defendant was at the home of his friends Philip Cagle (“Cagle”), Teresa Duncan (“Duncan”), and Duncan’s daughter, Becky<sup>1</sup>, when defendant decided to stay the night. At approximately 3:00 a.m., Becky woke up, got a drink from the kitchen, and returned to her bedroom. A few minutes later, defendant joined Becky in her room and watched television with her. Defendant got on Becky’s bed, positioned himself behind her, pulled down Becky’s shorts, and vaginally penetrated her with his penis. Becky told defendant to stop, and he did. Defendant then left the bedroom. Approximately one week later, Becky told her mother about the incident, and Becky’s mother told Cagle.

On 23 June 2010, Cagle invited defendant to his house. When defendant arrived, Cagle physically assaulted defendant while wearing brass knuckles. Injured, defendant returned to his home where he smoked some marijuana and took some sleeping pills. At approximately 11:00 p.m., someone called the Moore County Sheriff’s Department about the incident, and Detective Donald Shingleton (“Detective Shingleton”) drove to Cagle’s home. Becky told the detective that defendant had sexually assaulted her on the 17th of June, and Cagle admitted to the detective that he had beaten defendant. Detective Shingleton collected evidence including Becky’s bed comforter and the clothing she was wearing on the 17th of June.

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1. “Teresa Duncan” and “Becky” are pseudonyms used to protect the identity of the minor victim.

## STATE v. MORGAN

[225 N.C. App. 784 (2013)]

The detective obtained an arrest warrant for defendant, arrested defendant at his home, and took him to the sheriff's department. There, defendant waived his *Miranda* rights and cooperated with the questioning by Detective Shingleton. After approximately 15 minutes, defendant signed a written statement about the events on 17th and 18th of June in which he admitted that he had vaginally penetrated Becky.

Defendant was indicted on 20 September 2010 for (1) statutory rape of a child 13, 14, or 15 years old, (2) taking indecent liberties with a minor, and (3) sexual battery. A grand jury issued a superseding indictment for the three charges on 2 May 2011; the new indictment changed the date of the offense to "on or about" 17 or 18 June 2010 and changed the name of the grand jury witness. On 27 November 2010, defendant filed a motion to suppress the written statement he provided to Detective Shingleton. The motion was heard on 27 February 2012 in Moore County Superior Court, Judge Anderson Cromer presiding. At the conclusion of the hearing, Judge Cromer orally denied the motion, and the case proceeded to a jury trial the next day. The jury returned verdicts of guilty as to the charges of statutory rape of a 15-year-old girl and indecent liberties with a child, but it acquitted defendant of sexual battery. The trial court consolidated the two convictions and sentenced defendant to 180-225 months imprisonment. Defendant appeals.

**A. Motion to Suppress**

[1] Defendant first argues that the trial court erred by failing to set out written findings of fact and conclusions of law in denying his motion to suppress. Defendant contends that there was a material conflict in the evidence as to whether he voluntarily waived his *Miranda* rights and voluntarily provided his written statement regarding the events of 17 and 18 June 2010. This conflict, he argues, required the trial court to enter a written order when ruling on his motion to suppress.

N.C. Gen. Stat. § 15A-977(f) (2011) provides that when a trial court rules on a motion to suppress, "[t]he judge must set forth in the record his findings of facts and conclusions of law." We have interpreted this statute "as mandating a written order unless (1) the trial court provides its rationale from the bench, and (2) there are no material conflicts in the evidence at the suppression hearing." *State v. Williams*, 195 N.C. App. 554, 555, 673 S.E.2d 394, 395 (2009).

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[W]hen a trial court's failure to make findings of fact and conclusions of law is assigned as error, the appropriate standard of review on appeal is as follows: The trial court's ruling on the motion to suppress is fully reviewable for a determination as to whether the two criteria set forth in *Williams* have been met[.]

*State v. Baker*, 208 N.C. App. 376, 381, 702 S.E.2d 825, 829 (2010) (citing *Williams*, 195 N.C. App. at 555, 673 S.E.2d at 395). "If a reviewing court concludes that both criteria are met, then the findings of fact are implied by the trial court's denial of the motion to suppress[.]" *Id.* "If a reviewing court concludes that either of the criteria is not met, then a trial court's failure to make findings of fact, contrary to the mandate of section 15A-977(f), is fatal to the validity of its ruling and constitutes reversible error." *Id.* at 381-82, 702 S.E.2d at 829.

In *State v. Neal*, \_\_\_ N.C. App. \_\_\_, \_\_\_, 709 S.E.2d 463, 468 (2011), we concluded that a material conflict in the evidence required the trial court to enter a written order resolving the conflict. The trial court announced, from the bench, its rationale for its denial of the defendant's motion. *Id.* at \_\_\_, 709 S.E.2d at 468. The trial court's oral findings addressed the defendant's contention that the arresting officer promised to "strike" a charge of trespass if he would provide a statement to the police and consent to a search of his house. *Id.* at \_\_\_, 709 S.E.2d at 466. Despite the fact that the trial court addressed this evidence in its oral findings, we concluded that because there was a material conflict in the evidence, *Williams* "necessitated a written order with findings of fact resolving the conflict." *Neal*, \_\_\_ N.C. App. at \_\_\_, 709 S.E.2d at 470.

In the recent decision of *State v. Oates*, \_\_\_ N.C. \_\_\_, \_\_\_, 732 S.E.2d 571, 574 (2012), the Supreme Court of North Carolina addressed the timeliness of the State's appeal from the trial court's grant of a motion to suppress pursuant to N.C. Gen. Stat. § 15A-977(f). Regarding the necessity of a written order, the Supreme Court stated:

[A] judge ruling on a suppression motion that is not determined summarily is required to "set forth in the record his findings of facts and conclusions of law." N.C.G.S. § 15A-977(f) (2011). While a written determination is the best practice, nevertheless the statute does not require that these findings and conclusions be in writing.

## STATE v. MORGAN

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*Id.* The holding in *Oates* was related to “the window for the filing of a written notice of appeal in a criminal case” pursuant to Rule 4 of the North Carolina Rules of Appellate Procedure and N.C. Gen. Stat. § 15A-1448. *Id.* While we conclude the Court’s comments on section 15A-977(f) were not necessary to the Court’s holding in *Oates*, we do not find the Court’s comments to contradict our analysis of the statute under *Williams* or *Neal*—that a written order is necessary *unless* the court announces its rationale from the bench and there are no material conflicts in the evidence.

Here, the State contends that it is clear from the transcript that the trial court provided its rationale for denying defendant’s motion to suppress. Indeed, the trial court acknowledged that there was evidence that defendant had sustained physical injuries in an assault and ingested controlled substances prior to his interrogation, but concluded that neither of these factors rendered defendant’s written statement involuntary. The trial court did not, however, address whether plaintiff’s waiver of his *Miranda* rights and the signed statement had been obtained in exchange for a promise of leniency.

“[A] material conflict in the evidence exists when evidence presented by one party controverts evidence presented by an opposing party such that the outcome of the matter to be decided is likely to be affected.” *Baker*, 208 N.C. App. at 384, 702 S.E.2d at 831. In ruling on defendant’s motion to suppress, the voluntariness of defendant’s waiver of his *Miranda* rights and of his written statement was central to the outcome of the motion. The Supreme Court of North Carolina has recognized that promises of leniency and a defendant’s intoxication are factors to be considered in determining voluntariness of a defendant’s statements. *See State v. Pruitt*, 286 N.C. 442, 458, 212 S.E.2d 92, 102-03 (1975) (concluding the defendant’s confession was involuntary where the interrogating police officers’ statements created in the defendant “fear or hope, or both” when the officers implied that “things would be better for defendant if he would cooperate, *i.e.*, confess”); *State v. McKoy*, 323 N.C. 1, 22, 372 S.E.2d 12, 23 (1988) (“While intoxication is a circumstance critical to the issue of voluntariness, intoxication at the time of a confession does not necessarily render it involuntary. It is simply a factor to be considered in determining voluntariness.” (citation omitted)), *sentence vacated on other grounds*, 494 U.S. 433, 108 L. Ed. 2d 369 (1990).

Defendant testified that he did not recall signing the confession. He could only recall signing what he thought was a waiver of his *Miranda* rights, and that he signed the waiver because Detective

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Shingleton indicated he could help defendant get probation. The detective denied making any promises to defendant. Defendant also testified that he was in a “good amount of pain” and was “highly under the influence” of the controlled substances he had ingested. Detective Shingleton testified that defendant did not appear to be under the influence of any “impairing-type substance” during the interrogation.

This testimony presented a conflict in the evidence which was likely to affect the outcome of the motion to suppress. Thus, the conflict was a material conflict as contemplated by N.C. Gen. Stat. § 15A-977(f). Accordingly, the trial court was required to enter a written order of its findings and conclusions of law. As it failed to do so, we must remand for entry of a written order on defendant’s motion to suppress with additional findings and conclusions of law addressing the material conflicts in the evidence. *See Neal*, \_\_\_ N.C. App. at \_\_\_, 709 S.E.2d at 470 (concluding “the trial court’s failure to make written findings does not require remand for a new trial, but remand for further findings of fact” and conclusions of law to resolve material conflicts in the evidence).

**B. Indictment for Statutory Rape**

[2] Defendant next argues that the trial court lacked jurisdiction to enter judgment on the charge of statutory rape because the superseding indictment did not satisfy the requirements of N.C. Gen. Stat. § 15-144.1, the statute that authorizes short-form indictments for rape, or N.C. Gen. Stat. § 14-27.7A(a), the statute providing the elements of statutory rape of a child 13, 14, or 15 years old. We disagree.

“A facially invalid indictment deprives the trial court of jurisdiction to enter judgment in a criminal case.” *State v. Haddock*, 191 N.C. App. 474, 476, 664 S.E.2d 339, 342 (2008). “An indictment is not facially invalid as long as it notifies an accused of the charges against him sufficiently to allow him to prepare an adequate defense and to protect him from double jeopardy.” *Id.* at 477, 664 S.E.2d at 342. Additionally, “[n]otification is sufficient if the illegal act or omission alleged in the indictment is ‘clearly set forth so that a person of common understanding may know what is intended.’” *Id.* (quoting *State v. Coker*, 312 N.C. 432, 435, 323 S.E.2d 343, 346 (1984)).

Here, the textual description of the statutory rape charge provided in the superseding indictment stated that defendant “unlawfully, willfully and feloniously did carnally know and abuse” Becky, “a child of the age of 13, 14 or 15 years,” and that defendant was “at least

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six years older” than Becky. The statute cited in the indictment for this charge was N.C. Gen. Stat. § 14-27.7A(a), which states:

A defendant is guilty of a Class B1 felony if the defendant engages in vaginal intercourse or a sexual act with another person who is 13, 14, or 15 years old and the defendant is at least six years older than the person, except when the defendant is lawfully married to the person.

Defendant contends that because the indictment did not contain the words “vaginal intercourse” as provided in section 14-27.7A, it omitted an essential element of the crime, thus invalidating the indictment. *See State v. Bartley*, 156 N.C. App. 490, 499, 577 S.E.2d 319, 324 (2003) (“[A]n indictment is fatally defective when the indictment fails on the face of the record to charge an essential element of the offense.”). Defendant concedes, however, that at common law “carnal knowledge” and “sexual intercourse” are synonymous. *See State v. Locklear*, 304 N.C. 534, 539, 284 S.E.2d 500, 503 (1981). “There is ‘carnal knowledge’ or ‘sexual intercourse’ in a legal sense if there is the slightest penetration of the sexual organ of the female by the sexual organ of the male.” *State v. Bowman*, 232 N.C. 374, 375-76, 61 S.E.2d 107, 108 (1950). As the indictment alleged that defendant did “carnally know” Becky, a person of common understanding would know that the indictment alleged an act of vaginal intercourse. Therefore, we find that the indictment alleged all material elements of the crime charged.

**[3]** As to the indictment’s alleged insufficiency in regard to N.C. Gen. Stat. § 15-144.1, defendant contends that the superseding indictment was fatally defective because it did not contain the statutory language “by force and against her will[.]” N.C. Gen. Stat. § 15-144.1(a). We conclude, however, that section 15-144.1 does not apply in this case as the statute’s subsections do not address an indictment for the statutory rape of a child 13, 14, or 15 years old. *See* N.C. Gen. Stat. § 15-144.1(a) (providing the essential elements for an indictment for forcible rape); N.C. Gen. Stat. § 15-144.1(b) (providing the essential elements for an indictment for rape of a female child under the age of 13); N.C. Gen. Stat. § 15-144.1(c) (providing the essential elements for an indictment on rape of a person who is mentally disabled, mentally incapacitated, or physically helpless).<sup>2</sup>

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2. Because N.C. Gen. Stat. § 15-144.1 provides the essential elements for statutory rape of a female under 13, we suggest that the General Assembly consider whether it intended the statute to omit the elements for statutory rape of a female 13, 14, or 15 years old.



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[225 N.C. App. 791 (2013)]

The indictment in this case was sufficient because it alleged all material elements of section 14-27.7A. Thus, the superseding indictment was not defective, and it provided defendant with sufficient notice of the crimes with which he was charged such that he could prepare an adequate defense.

**Conclusion**

We find no error in the indictment and conclude that the trial court had jurisdiction to enter its judgment. We remand for the trial court to enter written findings of fact and conclusions of law for its ruling on defendant's motion to suppress.

No Error in part; Remanded.

Judges McGEE and ELMORE concur.

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STATE OF NORTH CAROLINA

v.

TRACY LEE WARREN

No. COA12-811

Filed 5 March 2013

**1. Embezzlement—testimony of motel owner—defendant's duties**

The trial court did not err in an embezzlement prosecution against a motel manager by admitting testimony from the owner concerning defendant's duties. Although defendant argued that the owner had no first-hand knowledge of the tasks defendant performed, the owner's testimony that defendant generated the deposit summaries and put together the bank deposits was properly within the scope of his personal knowledge as contemplated by N.C.G.S. § 8C-1, Rule 602.

**2. Embezzlement—owner of property—indictment and evidence**

The trial court did not err in an embezzlement case by failing to dismiss the charges where defendant alleged a fatal variance between the indictment and the evidence. Although the entity alleged as the victim in the indictment, Smoky Park Hospitality,

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was a management company and not the owner, as the manager Smoky Park Hospitality had a special property interest in the money embezzled from the business.

**3. Indictment and Information—variance with evidence—name of motel from which money embezzled—variance not material**

A variance between the name “Comfort Inn” and “Comfort Inn West” in the indictment and the evidence in an embezzlement prosecution was not material and not fatal. There was no evidence of confusion or controversy as to which Comfort Inn defendant was charged with embezzling from.

**4. Embezzlement—evidence sufficient**

Assuming that an argument supporting a motion to dismiss that was not made at trial was properly preserved for appellate review, defendant’s contention that the evidence admitted against her amounted to no more than assumption and speculation was not persuasive. The record revealed sufficient evidence to support the submission of the embezzlement charges to the jury.

Appeal by defendant from judgment entered 1 December 2011 by Judge James U. Downs in Buncombe County Superior Court. Heard in the Court of Appeals 30 January 2013.

*Attorney General Roy Cooper, by Special Deputy Attorney General Gayl M. Manthei, for the State.*

*David Belser for defendant-appellant.*

BRYANT, Judge.

Where the testimony was based on the personal knowledge of the witness, the trial court did not err in overruling defendant’s challenge pursuant to Rule 602. Where the statement of ownership in the indictment was not defective and there was not a material variance between the business name used in the indictment and the evidence elicited at trial, the trial court did not err in denying defendant’s motion to dismiss. And, the trial court did not err by denying defendant’s motion to dismiss for insufficiency of the evidence.

Defendant Tracy Lee Warren worked for the Comfort Inn West in Buncombe County. At some point after 2000, defendant was promoted to general manager for the hotel. Her duties then included handling customer service, filling in when employees failed to show up

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for work, writing bills, inspecting rooms, helping out in laundry or housekeeping, and making deposits.

On 12 July 2010, defendant was charged with embezzlement in thirteen indictments, one for each month from June 2008 through June 2009. In total, the indictments charged defendant with embezzling \$80,405.96 over a period of thirteen months. A jury trial commenced during the 28 November 2011 Criminal Session of Buncombe County Superior Court, the Honorable James U. Downs presiding. Defendant was found guilty on all thirteen counts. Judgment was entered in accordance with the jury verdicts and defendant was sentenced to a term of six to eight months for each offense, each term to be served consecutively. The trial court then suspended each sentence and imposed supervised probation for a period of sixty months. Defendant appeals.

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On appeal, defendant raises the following issues: Whether the trial court committed reversible error (I) by allowing a witness to testify that defendant put the deposits together; (II) in failing to dismiss the charges due to a variance between the indictment and the evidence adduced at trial; and (III) in denying defendant's motion to dismiss for insufficient evidence.

*I*

[1] Defendant argues that the trial court erred in allowing Mahesh Patel, a witness for the prosecution, to testify over objection that defendant was responsible for removing deposits from the safe, confirming a match of the figures, preparing deposit slips and taking the money to the bank. Specifically, defendant argues that Patel was testifying to tasks within defendant's job description but that he had no first-hand knowledge of what tasks she performed. We disagree.

Per our Rules of Evidence, Rule 602, "[a] witness may not testify to a matter unless evidence is introduced sufficient to support a finding that he has personal knowledge of the matter. Evidence to prove personal knowledge may, but need not, consist of the testimony of the witness himself." N.C. Gen. Stat. § 8C-1, Rule 602 (2011).

Patel was the owner of the Comfort Inn West. He promoted defendant to general manager and assigned to her the duties she performed at the time of the events in question. Patel testified on direct examination that in June 2008 there was a discrepancy between the cash report—the record of the amount of money received by the hotel, and

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the deposit reconciliation—the report detailing the amounts that were deposited in the hotel’s bank account. The discrepancy amounted to \$8,740.48. Defendant contends that the trial court erred in overruling his objection to the following testimony:

Q. And again, the cash report—the deposit summaries in QuickBooks, those were all generated by the defendant?

A. Yes.

Q. And the deposits themselves, they were all put together by the defendant?

A. Yes.

MR. OWEN: Objection, unless he has firsthand knowledge.

We note that earlier in his testimony, Patel described defendant’s duties as general manager for Comfort Inn West: Defendant was responsible for “handling customer service. When somebody don’t show up, she fills in; writing bills, doing the deposits, inspecting rooms, helping out in laundry or housekeeping. Whatever it took, she was in charge.” With regard to handling deposits for the business, Patel testified that defendant “would take the money to the bank, the cash and the checks” and that she “did the payroll.”

A. Usually after midnight, a night audit is run. And the report is usually—we put it in the back [office], where one is for cash reconciliation and one is a hotel detail summary, which gives you the credit cards and the whole thing. And we enter—take those two reports and put it into QuickBooks in the back office, manually putting the figures in.

...

Q. Okay. Well, and when she was—when the defendant was your manager from 2006 through July of 2009, who all had a key to access the back office?

A. The back office, Tracy had a key, I had a key . . . .

Q. And was there a safe involved in your recordkeeping as well?

A. Not for recordkeeping, but—

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Q. Well, for the deposits.

A. Deposits, there was a safe in the front where you drop the deposit and it's a combination. You have to get to it.

Q. And who had the combination to the safe during the period that [defendant] was your manager, '06 to '09?

A. [Defendant] and me.

Q. [Defendant] and you?

A. Only the two of us.

Patel testified to his knowledge of the duties of defendant in the position of general manager of the Comfort Inn West, and given that knowledge, his testimony that defendant generated the deposit summaries and put together the bank deposits was properly within the scope of his personal knowledge as contemplated by Rule 602. *See State v. Corbett*, 339 N.C. 313, 330, 451 S.E.2d 252, 261 (1994). Accordingly, defendant's argument is overruled.

## II

[2] Defendant next argues that the trial court committed reversible error in failing to dismiss the charges due to a fatal variance between the allegation of ownership in the indictments and the evidence presented at trial. Specifically, defendant contends that the allegation in the indictments that Smokey Park Hospitality, Inc., d/b/a Comfort Inn had an interest in the property embezzled varied significantly from the evidence presented at trial. We disagree.

"A variance occurs where the allegations in an indictment, although they may be sufficiently specific on their face, do not conform to the evidence actually established at trial." *State v. Norman*, 149 N.C. App. 588, 594, 562 S.E.2d 453, 457 (2002) (citation omitted). "In order for a variance between the indictment and the evidence presented at trial to warrant reversal of a conviction, that variance must be material. A variance is not material, and is therefore not fatal, if it does not involve an essential element of the crime charged." *State v. Lilly*, 195 N.C. App. 697, 700, 673 S.E.2d 718, 720-21 (2009) (citation omitted).

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Defendant was charged with embezzlement in thirteen separate indictments—one for each month from June 2008 through June 2009. Each indictment set forth the following accusation:

[defendant] unlawfully, willfully and feloniously did embezzle, fraudulently and knowingly misapply and convert to the defendant's own use, and take and make away with and secrete with the intent to embezzle and fraudulently misapply and convert to the defendant's own use U.S. Currency . . . belonging to Smoky Park Hospitality, Inc. DBA: Comfort Inn.

At trial, on cross-examination, Patel testified that in 1999 Smoky Park Investments, Inc., sold its hotel, the Comfort Inn West, to Patel and his wife. Patel and his wife then leased the hotel to a business entity named Smoky Park Hospitality. Patel testified that Smoky Park Hospitality never owned the hotel; it acted as a management company, running the business.

We first consider defendant's argument that there was a fatal variance between the entity named as having an ownership interest in the money embezzled, as set forth in the indictment—Smoky Park Hospitality, and the evidence adduced at trial. We characterize defendant's contention as an argument that the asserted victim, Smoky Park Hospitality, had no ownership interest in the money embezzled. However, this Court has previously held that “[i]t is sufficient if the person alleged in the indictment to be the owner has a special property interest, such as that of a bailee or a custodian, or otherwise has possession and control of it.” *State v. Linney*, 138 N.C. App. 169, 172, 531 S.E.2d 245, 250 (2000) (citation omitted); *see also*, *State v. Kornegay*, 313 N.C. 1, 27, 326 S.E.2d 881, 900 (1985) (An indictment for embezzlement or misappropriation of the property of another is not limited to alleging ownership in the legal owner “but may allege ownership in anyone else who has a special property interest recognized in law.” (citation omitted)).

The evidence adduced at trial was that Smoky Park Hospitality managed the hotel, and as such had a special property interest in the money embezzled from the business. Therefore, we reject defendant's contention that Smoky Park Hospitality had no ownership interest.

[3] As to defendant's contention that there was a fatal variance between the use of the name “Comfort Inn” as asserted in the indictment and “Comfort Inn West” by the witness at trial, we hold this vari-

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ance immaterial. The primary purpose of an indictment is to enable the defendant to prepare for trial. *State v. Farrar*, 361 N.C. 675, 678, 651 S.E.2d 865, 866 (2007); *see also*, *State v. Penley*, 277 N.C. 704, 707, 178 S.E.2d 490, 492 (1971) (“If an indictment charges the offense in a plain, intelligible, and explicit manner and contains averments sufficient to enable the court to proceed to judgment, and to bar a subsequent prosecution for the same offense, it is sufficient.” (citations omitted)). A variance is not material, and therefore not fatal, if it does not involve an essential element of the crime charged. *State v. Pickens*, 346 N.C. 628, 646, 488 S.E.2d 162, 172 (1997) (citation omitted). “A variance will not be deemed fatal where there is no controversy as to who in fact was the true owner of the property.” *State v. Ellis*, 33 N.C. App. 667, 669, 236 S.E.2d 299, 301 (1977) (citation omitted). Defendant provides this Court with no record evidence, and we find none, indicative of confusion or controversy as to which Comfort Inn defendant was charged with embezzling money as general manager. Accordingly, we overrule this argument.

## III

[4] Lastly, defendant argues that the trial court committed reversible error in denying her motions to dismiss because of insufficiency of the evidence. Defendant argues that the evidence in the case amounted to no more than assumptions and speculation. We disagree.

“In a criminal case, a defendant may not make insufficiency of the evidence to prove the crime charged the basis of an issue presented on appeal unless a motion to dismiss the action, or for judgment as in case of nonsuit, is made at trial.” R. App. P. 10(a)(3) (2012); *see also*, *State v. Farmer*, 177 N.C. App. 710, 630 S.E.2d 244 (2006).

Before the trial court, both at the close of the State’s evidence and all the evidence, defendant made motions to dismiss the charges arguing that there existed a fatal variance between the amount of money set forth as embezzled in the indictment and the amount presented at trial, and that the embezzled funds “belonged to Smoky Park Hospitality.” However, the argument that defendant makes on appeal concerning the sufficiency of the evidence was not clearly presented to the trial court. Assuming *arguendo* that defendant’s argument was preserved for appellate review, defendant’s contention that the evidence admitted against her amounted to no more than assumption and speculation is not persuasive. Our review of the record reveals sufficient evidence to support the submission of the embezzlement charges to the jury: evidence was presented that defendant

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recorded the hotel cash receipts and created the bank deposit slips; evidence was presented regarding the amount of cash received by the hotel for each month from June 2008 through June 2009 and the amount of the cash deposits in the hotel's bank account; and evidence was presented that defendant was the only person with access to the records and the cash once it was deposited in the safe to await deposit in the hotel bank account. This argument is without merit.

No error.

Judges ELMORE and ERVIN concur.

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JEFF L. THIGPEN, ET. AL., PLAINTIFFS

v.

ROY A. COOPER, III, ATTORNEY GENERAL AND THE STATE OF NORTH  
CAROLINA, DEFENDANTS

No. COA12-582

Filed 5 March 2013

**Civil Rights—constitutionality of marriage statutes—defendants not 42 U.S.C. § 1983 people**

The trial court properly granted defendants' motion to dismiss a 42 U.S.C § 1983 claim alleging that three North Carolina marriage statutes violated plaintiffs' constitutional rights. The Supreme Court of the United States has held that a State is not a person within the meaning of 42 U.S.C § 1983. Likewise, Attorney General Cooper was not a person within the meaning of 42 U.S.C § 1983 since he was not shown to have played a role in enforcing the statutes, thereby having engaged in an ongoing constitutional violation. Moreover, the trial court was not required, under these circumstances, to have allowed plaintiffs to join additional defendants.

Appeal by plaintiffs from order entered 5 April 2012 by Judge Judson D. DeRamus, Jr. in Guilford County Superior Court. Heard in the Court of Appeals 11 October 2012.

*Smith, James, Rowlett & Cohen, LLP, by Norman B. Smith, for plaintiffs-appellants.*



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*Attorney General Roy Cooper, by Special Deputy Attorney General Valerie L. Bateman and Assistant Attorney General Susannah P. Holloway, for defendants-appellees.*

GEER, Judge.

Plaintiffs Jeff L. Thigpen, Reverend Randall J. Keeney, Reverend Julie Peeples, Reverend Dr. Daniel G. Koenig, Mary Jamis, Starr Johnson, Frank L. Benedetti, Thomas G. Trowbridge, Carolyn S. Weaver, and Alan Brilliant appeal from the trial court's order dismissing their declaratory judgment action alleging that three North Carolina marriage statutes violate their constitutional rights to free exercise of religion and separation of church and state. On appeal, plaintiffs contend that the trial court erred in concluding (1) that defendant Attorney General Roy A. Cooper, III, sued only in his official capacity, was not a proper defendant under 42 U.S.C. § 1983 and (2) that plaintiffs lacked standing to pursue their federal constitutional claims.

We hold that under the controlling standard set out in *Ex Parte Young*, 209 U.S. 123, 52 L. Ed. 714, 28 S. Ct. 441 (1908), plaintiffs failed to name a proper defendant for purposes of their § 1983 claims. The trial court, accordingly, did not err in granting defendants' motion to dismiss. We do not reach the parties' arguments regarding standing.

Facts

On 8 December 2011, plaintiffs filed an action against defendant Attorney General Cooper in his official capacity, challenging the constitutionality of marriage statutes N.C. Gen. Stat. §§ 51-1 and 51-6. Plaintiffs amended their complaint as a matter of right on 28 December 2011. The plaintiffs include (1) the Register of Deeds for Guilford County; (2) three ministers who do not wish to have the marriages they perform licensed and registered, two of whom also are willing to solemnize the marriages of same-sex couples; (3) same-sex domestic partners who desire to have a ceremonial, non-religious marriage registered in the state; (4) same-sex domestic partners who desire to have a ceremonial, religious marriage registered in the state; (5) a heterosexual couple who desired to have a religious ceremonial marriage, but were unwilling to be married pursuant to a state issued license because they both were permanently and totally disabled and were receiving Medicaid benefits that would be cut off if they married

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pursuant to a state license;<sup>1</sup> and (6) an unmarried, heterosexual man who may wish to marry a woman in the future, but who does not wish to participate in any type of state-required ceremony.

On 6 January 2012, defendant Attorney General Cooper filed a motion to dismiss pursuant to Rules 12(b)(1), (2), and (6) of the North Carolina Rules of Civil Procedure. On 8 February 2012, the trial court entered an order allowing plaintiffs to again amend their complaint. In their second amended complaint, plaintiffs added the State of North Carolina as a defendant and challenged the constitutionality of N.C. Gen. Stat. § 51-7, as well as N.C. Gen. Stat. §§ 51-1 and 51-6.

In relevant part, N.C. Gen. Stat. § 51-1 (2011) provides:

A valid and sufficient marriage is created by the consent of a male and female person who may lawfully marry, presently to take each other as husband and wife, freely, seriously and plainly expressed by each in the presence of the other, either:

- (1) a. In the presence of an ordained minister of any religious denomination, a minister authorized by a church, or a magistrate; and
- b. With the consequent declaration by the minister or magistrate that the persons are husband and wife; or
- (2) In accordance with any mode of solemnization recognized by any religious denomination, or federally or State recognized Indian Nation or Tribe.

N.C. Gen. Stat. § 51-6 (2011) provides in relevant part:

No minister, officer, or any other person authorized to solemnize a marriage under the laws of this State shall perform a ceremony of marriage between a man and woman, or shall declare them to be husband and wife, until there is delivered to that person a license for the marriage of the said persons, signed by the register of deeds of the county in which the marriage license was issued or by a lawful deputy or assistant. There must be at least two witnesses to the marriage ceremony.

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1. Plaintiffs assert in their brief that plaintiff Burl S. Brinn, Jr. is now deceased.

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Finally, N.C. Gen. Stat. § 51-7 (2011) provides:

Every minister, officer, or any other person authorized to solemnize a marriage under the laws of this State, who marries any couple without a license being first delivered to that person, as required by law, or after the expiration of such license, or who fails to return such license to the register of deeds within 10 days after any marriage celebrated by virtue thereof, with the certificate appended thereto duly filled up and signed, shall forfeit and pay two hundred dollars (\$200.00) to any person who sues therefore, and shall also be guilty of a Class 1 misdemeanor.

In their second amended complaint, plaintiffs alleged that the ceremonial solemnization of marriage is either a sacrament or a fundamentally important religious exercise for all religions and, therefore, the freedom of religious marriage celebration is protected under the federal and state constitutions. Plaintiffs alleged that “[p]ersons wishing to marry also have the constitutional right not to participate in a religious ceremony of marriage or any marriage ceremony at all.”

Plaintiffs asserted that N.C. Gen. Stat. §§ 51-1, 51-6, and 51-7 interfere with heterosexual couples’ right to marry by requiring, without any compelling state interest, (1) a ceremonial marriage performed by a magistrate, pastor, priest, or rabbi, and (2) that the marriage be licensed and registered. With respect to same sex couples, plaintiffs alleged that the State lacked any compelling governmental interest in prohibiting or requiring that the marriage of same sex couples be licensed or registered.

The complaint alleged with respect to pastors, priests, and rabbis that the State acted unconstitutionally in requiring them to act as an agent of the State in performing marriage ceremonies and participating in the submission of the state-granted license for the marriage because such requirements amount to the establishment of religion. The complaint further alleged that it is unconstitutional to require individuals to participate in a ceremony prescribed by the State and to participate in the licensing of marriages since that violates freedom of religion. Finally, the complaint alleged that it is unconstitutional for the State to make it unlawful for a pastor, priest, or rabbi to solemnize the marriage of same-sex couples.

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The complaint summed up its contention:

In order adequately and fully to protect the personal liberty and religious freedom of citizens of North Carolina and the United States, there must be a de-coupling and disentanglement of the state from the personal and religious institution of marriage. The institution of marriage should be solely in the dominion of citizens and their religious and secular organizations, except that the state should be permitted to carry out prohibitions of marriage for infancy, insanity, bigamy or polygamy, and incest, and marriage as a result of fraud, duress, joke, or mistake; and the state should be permitted to adjudicate rights relating to support, child custody, and property in connection with marriages and their dissolution.

Based on these allegations, plaintiffs contended that the statutes interfered with the freedom of religion and constituted a state establishment of religion in violation of Article 1, § 13 of the North Carolina Constitution and the First Amendment to the United State Constitution. Plaintiffs further contended that the marriage statutes deprived them of personal liberty in violation of Article 1, § 19 of the North Carolina Constitution and the Fourteenth Amendment of the United States Constitution. Plaintiffs asserted their First and Fourteenth Amendment claims under 42 U.S.C. § 1983. Plaintiffs sought only a declaratory judgment that the statutes violated their constitutional rights and did not seek damages or injunctive relief.

On 24 February 2012, defendants moved to dismiss plaintiffs' second amended complaint under Rules 12(b)(1), (2), and (6). Defendants asserted that sovereign immunity barred plaintiffs' § 1983 and state constitutional claims against the State. Defendants further asserted that under *Will v. Michigan Dep't of State Police*, 491 U.S. 58, 105 L. Ed. 2d 45, 109 S. Ct. 2304 (1989), and *Corum v. Univ. of N.C.*, 330 N.C. 761, 413 S.E.2d 276 (1992), Attorney General Cooper was not a proper defendant for plaintiffs' § 1983 or state constitutional claims because plaintiffs had not alleged that he had participated in any unconstitutional acts. Finally, defendants argued that certain of the plaintiffs lacked standing because they had not alleged any immediate or threatened injury.

On 5 April 2012, the trial court entered an order granting defendants' motion to dismiss. The order provided in relevant part:

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Plaintiffs have not alleged any waiver of sovereign immunity by either defendant and have not alleged that the Defendant Attorney General has taken or threatened to take any particular action against any of them pursuant to any of those provisions of Chapter 51. Plaintiffs seek no monetary damages or injunctive relief.

Plaintiffs timely appealed the order to this Court.

Discussion

In their brief,<sup>2</sup> plaintiffs abandon their state constitutional claims in light of “the passage of the constitutional amendment on May 9, 2012, outlawing same-sex marriages and domestic unions.” Consequently, only plaintiffs’ federal constitutional claims brought under § 1983 are before this Court. We review de novo the trial court’s grant of defendants’ motion to dismiss pursuant to Rule 12(b)(6). *Burgin v. Owen*, 181 N.C. App. 511, 512, 640 S.E.2d 427, 429 (2007).

In relevant part, § 1983 provides:

Every *person* who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer’s judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable.

(Emphasis added.) Thus, “[t]he text of section 1983 permits actions only against a ‘person.’ ” *Corum*, 330 N.C. at 771, 413 S.E.2d at 282.

Here, plaintiffs have sued both the State and an official of the State, Attorney General Cooper. The question is whether either the State or Attorney General Cooper is a “person” for purposes of

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2. We note that plaintiff’s brief does not include a statement of grounds for appellate review. Although the basis for this Court’s jurisdiction may be obvious since plaintiff’s complaint was completely dismissed, the statement of grounds for appellate review is required by Rule 28(b)(4) of the North Carolina Rules of Appellate Procedure.

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§ 1983. The Supreme Court of the United States has held that “a State is not a person within the meaning of § 1983.” *Will*, 491 U.S. at 64, 105 L. Ed. 2d at 53, 109 S. Ct. at 2308. Accordingly, plaintiffs cannot assert their § 1983 claims against the State, and the trial court properly granted the State’s motion to dismiss those claims.

Turning to plaintiffs’ § 1983 claims against Attorney General Cooper, State “officials acting in their official capacity are [not] ‘persons’ under section 1983 *when the remedy sought is monetary damages.*” *Corum*, 330 N.C. at 771, 413 S.E.2d at 282-83 (emphasis added). However, “a state official in his or her official capacity, when sued for injunctive relief, would be a person under § 1983 because ‘official-capacity actions for prospective relief are not treated as actions against the State.’ ” *Will*, 491 U.S. at 71 n.10, 105 L. Ed. 2d at 58 n.10, 109 S. Ct. at 2312 n.10 (quoting *Kentucky v. Graham*, 473 U.S. 159, 167 n.14, 87 L. Ed. 2d 114, 122 n.14, 105 S. Ct. 3099, 3106 n.14 (1985)).

Here, plaintiffs do not seek monetary damages against Attorney General Cooper; they ask only for a declaration that the challenged statutes violate plaintiffs’ federal constitutional rights. The State nonetheless contends that the *Will* exception does not apply because plaintiffs are not seeking injunctive relief. *Will* did not, however, limit its holding to claims for injunctive relief, but rather concluded that a suit for injunctive relief was permissible *because it was an action for prospective relief*. *Id.* The Court has since clarified that in deciding whether an official capacity claim against a state official is permissible, “a court need only conduct a ‘straightforward inquiry into whether [the] complaint alleges an ongoing violation of federal law and seeks relief properly characterized as prospective.’ ” *Verizon Md. Inc. v. Pub. Serv. Comm’n of Md.*, 535 U.S. 635, 645, 152 L. Ed. 2d 871, 882, 122 S. Ct. 1753, 1760 (2002) (quoting *Idaho v. Coeur d’Alene Tribe of Idaho*, 521 U.S. 261, 296, 138 L. Ed. 2d 438, 465, 117 S. Ct. 2028, 2047 (1997) (O’Connor, J., joined by Scalia and Thomas, JJ., concurring in part and concurring in judgment)).<sup>3</sup>

The Supreme Court has, therefore, determined that actions seeking declaratory relief are permissible when they seek prospective relief against an alleged ongoing violation of federal law, but are not

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3. While *Verizon Maryland* addressed Eleventh Amendment immunity, “an entity with Eleventh Amendment immunity is not a ‘person’ within the meaning of § 1983.” *Howlett By & Through Howlett v. Rose*, 496 U.S. 356, 365, 110 L. Ed. 2d 332, 346, 110 S. Ct. 2430, 2437 (1990). Thus, whether a state official acting in his or her official capacity is a person under § 1983 asks whether the state official, acting in his or her official capacity, enjoys Eleventh Amendment immunity. *Id.*

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permissible when the declaratory judgment would serve only to expose the State to liability for retrospective damages awards. *See id.* at 646, 152 L. Ed. 2d at 882, 122 S. Ct. at 1760 (holding declaratory relief claim against state officials permissible under Eleventh Amendment because even though it sought “a declaration of the *past*, as well as the *future*, ineffectiveness of the [state] Commission’s action, . . . [i]t does not impose *upon the State* ‘a monetary loss resulting from a past breach of a legal duty on the part of the defendant state officials’” (quoting *Edelman v. Jordan*, 415 U.S. 651, 668, 39 L. Ed. 2d 662, 676, 94 S. Ct. 1347, 1358 (1974))). *See also Alden v. Maine*, 527 U.S. 706, 747, 144 L. Ed. 2d 636, 673-74, 119 S. Ct. 2240, 2263 (1999) (recognizing that the exception to Eleventh Amendment immunity for suits against state officials in their official capacity “is based in part on the premise that sovereign immunity bars relief against States and their officers in both state and federal courts, and *that certain suits for declaratory or injunctive relief* against state officers must therefore be permitted if the Constitution is to remain the supreme law of the land” (emphasis added)). *Compare Green v. Mansour*, 474 U.S. 64, 73, 88 L. Ed. 2d 371, 380, 106 S. Ct. 423, 428 (1985) (holding declaratory relief claim did not fall within Eleventh Amendment exception when, under unique circumstances of case, only beneficial result for claimants of declaratory judgment would effectively be to grant retrospective damages relief to claimants).<sup>4</sup>

In this case, plaintiffs allege that the three marriage statutes are presently unconstitutional. In their request for a declaration of that unconstitutionality, they are not seeking relief from past wrongs, but rather are seeking relief from these statutes in the future. Plaintiffs are thus seeking relief that is properly characterized as prospective.

The question remains, however, whether plaintiffs have met the second prong of the *Verizon Maryland* test by alleging that Attorney General Cooper is engaged in “‘an ongoing violation of federal law.’” *Verizon Maryland*, 535 U.S. at 645, 152 L. Ed. 2d at 882, 122 S. Ct. at 1760 (quoting *Coeur d’Alene Tribe of Idaho*, 521 U.S. at 296, 138 L. Ed. 2d at 465, 117 S. Ct. at 2047 (O’Connor, J., joined by Scalia and Thomas, JJ., concurring in part and concurring in judgment)). *See 281 Care Comm. v. Arneson*, 638 F.3d 621, 632 (8th Cir. 2011) (holding, while applying the *Verizon Maryland* test, that because there was no

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4. This analysis applies to cases seeking only declaratory relief in addition to cases seeking both injunctive and declaratory relief. *See Los Angeles Cnty. Bar Ass’n v. Eu*, 979 F.2d 697, 704 (9th Cir. 1992) (applying Eleventh Amendment immunity exception to allow suit against California Secretary of State in her official capacity seeking only declaratory judgment that California statute was unconstitutional).

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dispute plaintiffs sought prospective relief, “[t]he only question is whether they have alleged that [the] defendant [Attorney General] is, herself, engaged in an ongoing violation of federal law”), *cert. review denied*, \_\_\_ U.S. \_\_\_, 183 L. Ed. 2d 710, 133 S. Ct. 61 (2012).

The United States Supreme Court in *Ex Parte Young* set out the test for determining the proper defendant for official-capacity actions against state officers challenging the constitutionality of a state statute:

In making an officer of the state a party defendant in a suit to enjoin the enforcement of an act alleged to be unconstitutional, it is plain that *such officer must have some connection with the enforcement of the act*, or else it is merely making him a party as a representative of the state, and thereby attempting to make the state a party.

It has not, however, been held that it was necessary that such duty should be declared in the same act which is to be enforced. In some cases, it is true, the duty of enforcement has been so imposed, but that may possibly make the duty more clear; if it otherwise exist it is equally efficacious. The fact that the state officer, by virtue of his office, has some connection with the enforcement of the act, is the important and material fact, and whether it arises out of the general law, or is specially created by the act itself, is not material so long as it exists.

209 U.S. at 157, 52 L. Ed. at 728, 28 S. Ct. at 453 (emphasis added) (internal citation omitted).

The Court in *Ex Parte Young* addressed whether the attorney general for Minnesota had sufficient connection with the enforcement of a railroad rate-setting statute. In concluding that he did, the Court pointed out that after the trial court had enjoined him from enforcing portions of the statute, the attorney general had, in violation of the injunction, in fact brought an action seeking to enforce the statute against one of the railroad companies. *Id.* at 160, 52 L. Ed. at 730, 28 S. Ct. at 454. The Court also pointed to specific statutes providing for the attorney general to prosecute all actions on behalf of the railroad commission and authorizing him to proceed against corporations violating the law, as well as case law vesting the attorney general with authority to enforce all state statutes. *Id.* at 160-61,



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52 L. Ed. at 730, 28 S. Ct. at 454. The Court concluded that the power of the attorney general's office as set forth in these statutes and the common law "sufficiently connected him with the duty of enforcement to make him a proper party." *Id.* at 161, 52 L. Ed. at 730, 28 S. Ct. at 454.

Other jurisdictions have applied the *Ex Parte Young* test to determine whether a particular state official may be sued in his or her official capacity in an action seeking a declaration that a state law is unconstitutional. *See, e.g., Sherman v. Cmty. Consol. Sch. Dist. 21 of Wheeling Twp.*, 980 F.2d 437, 440-41 (7th Cir. 1992) (applying *Ex Parte Young* test to request for declaratory relief under 42 U.S.C. § 1983 and holding attorney general was not proper defendant when "[p]laintiffs ha[d] not articulated any theory under which *Ex parte Young* supports a suit against the Attorney General, who has never threatened the [plaintiffs] with prosecution and as far as we can tell has no authority to do so"); *Finberg v. Sullivan*, 634 F.2d 50, 54 (3d Cir. 1980) (en banc) (in action to declare postjudgment garnishment procedures unconstitutional, holding that "[o]n the basis of the reasoning employed in *Ex Parte Young*, . . . [sheriff and prothonotary] are parties to [plaintiff's] dispute over the constitutionality of these rules and properly named as defendants in her suit").

For example, in *Lucchesi v. State*, 807 P.2d 1185, 1187 (Colo. Ct. App. 1990), the plaintiff's complaint included, among other claims, claims under 42 U.S.C. § 1983 challenging the constitutionality of Colorado taxing statutes and seeking only declaratory relief. The court explained that, under *Will*, in order for the official-capacity defendants to be "persons" for purposes of § 1983, "[t]he persons sued . . . must be those whose duties include implementation or enforcement of the statute being assailed." *Id.* at 1194. Applying this test, the Court held that while the state property tax administrator and certain county officials were sufficiently involved in the enforcement of the applicable statutes so as to be proper defendants with respect to the § 1983 claims, the Court could find "no specific responsibility of either the governor or the attorney general with reference to the assessment statutes that would render either of them a proper party to plaintiff's federal claims. Thus, neither the governor nor the attorney general is . . . a proper 'person' under § 1983." *Id.*

Finding these decisions persuasive, we hold that the *Ex Parte Young* test applies to determine whether a State official sued in his official capacity in a § 1983 action for prospective declaratory relief

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is a “person” for purposes of § 1983. Plaintiffs, in this case, have suggested that Attorney General Cooper is a proper defendant in a § 1983 action under *Ex Parte Young* because he stands as a surrogate of the State and because, as the complaint alleges, “[i]t is [the Attorney General’s] capacity and duty to defend the validity of the statutes of the state of North Carolina.”

The *Ex Parte Young* Court, however, rejected precisely these arguments. In laying out the “some connection with the enforcement of the act” test, the *Ex Parte Young* Court quoted its prior decision in *Fitts v. McGhee*, 172 U.S. 516, 43 L. Ed. 535, 19 S. Ct. 269 (1899):

“In the present case, as we have said, neither of the state officers named held any special relation to the particular statute alleged to be unconstitutional. They were not expressly directed to see to its enforcement. If, because they were law officers of the state, a case could be made for the purpose of testing the constitutionality of the statute, by an injunction suit brought against them, then the constitutionality of every act passed by the legislature could be tested by a suit against the governor and the attorney general, based upon the theory that the former, as the executive of the state, was, in a general sense, charged with the execution of all its laws, and the latter, as attorney general, might represent the state in litigation involving the enforcement of its statutes. That would be a very convenient way for obtaining a speedy judicial determination of questions of constitutional law which may be raised by individuals, but it is a mode which cannot be applied to the states of the Union consistently with the fundamental principle that they cannot, without their assent, be brought into any court at the suit of private persons.”

*Ex Parte Young*, 209 U.S. at 157, 52 L. Ed. at 728, 28 S. Ct. at 452-53 (quoting *Fitts*, 172 U.S. at 530, 43 L. Ed. at 541-42, 19 S. Ct. at 274-75).

Under *Ex Parte Young*, plaintiffs must show that Attorney General Cooper has some connection with the enforcement of the marriage statutes alleged to be unconstitutional. Because plaintiffs have not made any showing that Attorney General Cooper plays any role in the enforcement of the statutes, they have failed to demonstrate that the Attorney General has engaged in an ongoing violation

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of the federal constitution and, therefore, have not established that he is a “person” for purposes of § 1983.

Plaintiffs also argue that even if Attorney General Cooper is not a proper defendant for § 1983 purposes, rather than dismissing the action, the trial court should have allowed plaintiffs to join a proper § 1983 defendant pursuant to Rule 21 of the North Carolina Rules of Civil Procedure. Rule 21 provides in pertinent part that “[n]either misjoinder of parties nor misjoinder of parties and claims is ground for dismissal of an action; but on such terms as are just parties may be dropped or added by order of the court on motion of any party or on its own initiative at any stage of the action.”

Plaintiffs have not, however, cited any authority that suggests plaintiffs should be allowed, pursuant to Rule 21 of the Rules of Civil Procedure, to add a new defendant when the only existing defendants have all been properly dismissed. As the Ninth Circuit noted regarding the essentially identical Rule 21 of the Federal Rules of Civil Procedure, “[n]othing on the face of Rule 21 allows substitution of parties.” *Sable Commc’ns of Cal., Inc. v. Pac. Tel. & Tel. Co.*, 890 F.2d 184, 191 n.13 (9th Cir. 1989) (holding that when plaintiff sued state commission, which could not be sued under § 1983, Rule 21 did not provide means by which plaintiff could add individual members of commission as defendants). Rule 21, by its plain terms, addresses “misjoinder” of parties and not a plaintiff’s failure to assert a claim for relief against any of the existing defendants.

In sum, neither the State nor Attorney General Cooper are “persons” for purposes of plaintiffs’ claims under § 1983. The trial court was not required, under these circumstances, to allow plaintiffs to join additional defendants. Consequently, the court properly granted defendants’ motion to dismiss.

Affirmed.

Judges STEPHENS and McCULLOUGH concur.

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[225 N.C. App. 810 (2013)]

MARK WHITE AND TANIS T. DUFFIE, PLAINTIFF

v.

NORTHWEST PROPERTY GROUP-HENDERSONVILLE #1, LLC, DEFENDANT

No. COA12-1037

Filed 5 March 2013

**1. Appeal and Error—interlocutory orders and appeals—partial summary judgment—dismissal of counterclaims—final order**

The order granting defendant's motion for partial summary judgment was final and properly before the Court of Appeals. Defendant's voluntarily dismissal of its counterclaims on 17 May 2012 without prejudice had the effect of making the trial court's grant of partial summary judgment a final order.

**2. Highways and Streets—public road—change of grade—loss of access to right of way—no proof of negligence**

The trial court did not err by granting summary judgment in favor of defendant in an action seeking damages for plaintiffs' property caused by defendant's construction activities on a new road. There was no genuine issue of material fact regarding the public nature of the pertinent road. Any inconvenience suffered by plaintiffs as a result of the grading of the road authorized by the city was *damnum absque injuria* (loss without injury) and not compensable absent proof of negligence.

Appeal by plaintiffs from judgment entered 17 May 2010 by Judge Dennis J. Winner in Superior Court, Henderson County. Heard in the Court of Appeals 10 January 2013.

*Prince, Youngblood & Massagee, PLLC by Sharon B. Alexander, for plaintiff-appellant.*

*No defendant-appellees brief filed.*

STROUD, Judge.

Mark White and Tanis T. Duffie ("plaintiffs") appeal from judgment entered 17 May 2010 in Superior Court, Henderson County, granting a motion for partial summary judgment filed by Northwest Property Group-Hendersonville #1, LLC ("defendant"). Plaintiffs argue that the trial court erred in granting summary judgment because defendant is not entitled to governmental immunity. For the following reasons, we affirm the trial court's order.

**WHITE v. NW. PROP. GRP.-HENDERSONVILLE #1, LLC**

[225 N.C. App. 810 (2013)]

## I. Background

Plaintiffs previously appealed this same order. We dismissed their appeal as interlocutory. *White v. Northwest Property Group-Hendersonville No. 1, LLC*, 2011 WL 721051 (N.C.App.) (unpublished) (“*White I*”). In our previous opinion we laid out the factual background to this case:

Plaintiffs Mark White and Tanis T. Duffie (“plaintiffs”) are the owners of lots 48 and 49 located in a subdivision known as Jackson Farms Subdivision in Henderson County, North Carolina. A subdivision plat depicting the Jackson Farms Subdivision was recorded on 19 June 1950 in Plat Book 4, Page 102, Henderson County Registry, now Plat Cabinet B, Slide 342A. The Jackson Farms Subdivision plat outlines various lots and road rights-of-way in the subdivision, including the location of a forty-foot road extending the length of the subdivision from Old Spartanburg Highway to Spartanburg Highway/U.S. 176.

Beginning in April 2007, the City Council of Hendersonville (the “City Council”) began to consider the opening of the forty-foot road depicted in the Jackson Farms Subdivision plat as part of a redevelopment plan titled the Southside Transportation Study. The Southside Transportation Study was adopted by the City Council on 5 October 2006 with the goal of improving connectivity in the Southside area. As part of the redevelopment plan, a connector street was proposed between Old Spartanburg Highway and Spartanburg Highway/U.S. 176 [(“the Spartanburg Connector”)], where the forty-foot road in Jackson Farms Subdivision already existed.

Defendant Northwest Property Group–Hendersonville # 1, LLC (“defendant”), proposed construction of a grocery store, a retail strip building, and a retail drug store in the vicinity of the Jackson Farms Subdivision. The City Council discussed the new construction project at its 5 April 2007 meeting. At that meeting, the City Manager stated that defendant’s construction project presented an opportunity to implement the Southside Transportation Study, and that the City desired to work

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with defendant to build the connector street between Old Spartanburg Highway and Spartanburg Highway/U.S. 176. The City Council agreed by consensus to proceed with the project.

At its 3 May 2007 meeting, the City Council again discussed defendant's construction project in connection with defendant's application for rezoning. At the conclusion of the hearing on the proposed rezoning of defendant's property, the City Council unanimously adopted an ordinance amending the official zoning map of the City of Hendersonville. The new zoning ordinance incorporated a map depicting defendant's property, including the forty-foot road in Jackson Farms Subdivision as the connector street between Old Spartanburg Highway and Spartanburg Highway/U.S. 176.

At its 8 November 2007 meeting, the City Council considered and approved a contractual agreement with defendant for the construction of the roadway between Old Spartanburg Highway and Spartanburg Highway/U.S. 176 where the forty-foot road through Jackson Farms Subdivision existed. The contract required defendant to undertake and complete construction of the roadway pursuant to North Carolina Department of Transportation ("NCDOT") standards. The contract also established a cost-sharing plan under which the City would fund approximately sixty-six percent of the cost of the construction of the new road. The contract became effective as of 6 March 2008 upon signature by both the City and defendant.

Defendant obtained a permit from NCDOT for the road construction. The NCDOT permit contained explicit drawings specifying the grade of the road to be built. In June 2008, defendant began to make the improvements to the road pursuant to NCDOT permit specifications. As part of this construction, defendant re-graded the existing road to a higher elevation and erected a four-foot wall along the boundary of plaintiffs' property in Jackson Farms Subdivision.

As a result of the improvements made by defendant to the forty-foot road in Jackson Farms Subdivision, plain-

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tiffs are unable to access their property from that roadway and cannot drive onto the existing driveway leading to the garage on their property. Plaintiffs filed a complaint on 26 May 2009 requesting injunctive relief and compensation for damages to plaintiffs' property caused by defendant's construction activities. Defendant filed an answer on 22 July 2009 raising the defense of governmental immunity and asserted a counterclaim for breach of contract against plaintiff Mark White as to rent owed for leased and occupied retail space.

*Id.* at \*1-2.<sup>1</sup>

After remand to the trial court, defendant voluntarily dismissed its counterclaims on 17 May 2012 without prejudice. Plaintiffs filed another notice of appeal to this Court on 14 June 2012.

## II. Interlocutory Order

[1]

A grant of partial summary judgment, because it does not completely dispose of the case, is an interlocutory order from which there is ordinarily no right of appeal. . . . Ordinarily, an appeal from an order granting summary judgment to fewer than all . . . claim[s] is premature and subject to dismissal. However, since the [defendant] here voluntarily dismissed the claim which survived summary judgment, any rationale for dismissing the appeal fails. [Defendant's] voluntary dismissal of this remaining claim does not make the appeal premature but rather has the effect of making the trial court's grant of partial summary judgment a final order.

*Curl v. American Multimedia, Inc.*, 187 N.C. App. 649, 652-53, 654 S.E.2d 76, 78-79 (2007) (citations and quotation marks omitted). Moreover, there are no apparent violations of our Rules of Appellate Procedure, nor is there reason to think that the parties are attempting to misuse the Rules of Civil Procedure. *Cf. Hill ex rel. Hill v. West*, 177 N.C. App. 132, 135-36, 627 S.E.2d 662, 664 (2006) (dismissing an appeal from partial summary judgment as interlocutory despite

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1. There was an unimproved road called Chadwick Avenue in that right-of-way prior to the construction at issue here. According to the documents that defendant submitted to the N.C. Department of Transportation, the Spartanburg Connector is also known as Chadwick Avenue Extended.

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voluntary dismissal of other pending claims where counsel violated N.C.R. App. P. 28(b)(4) and it was apparent that counsel were “manipulating the Rules of Civil Procedure.”). Therefore, the order granting defendant’s motion for partial summary judgment is final and properly before us.

**III. Summary Judgment**

**[2]** Plaintiffs argue that the trial court erred in granting summary judgment because defendant was not permitted to invoke governmental immunity as a contractor. The issue, however, is not whether defendant is entitled to borrow governmental immunity as a government contractor, but whether it can be held liable solely for changing the grade to a road. As will be outlined below, this issue turns on whether that road is public or private.

**A. Standard of Review**

The trial court must grant summary judgment upon a party’s motion when “there is no genuine issue as to any material fact and ... any party is entitled to a judgment as a matter of law.” N.C. Gen.Stat. § 1A-1, Rule 56 (2005). On appeal, an order granting summary judgment is reviewed *de novo*.

*Griffith v. Glen Wood Co., Inc.*, 184 N.C. App. 206, 210, 646 S.E.2d 550, 554 (2007) (citation omitted).

**B. Change of Grade**

Plaintiffs allege that defendant obstructed access to the right-of-way on the western edge of their property by raising the grade of the roadway and that their loss of direct access to the right-of-way is compensable. Plaintiffs did not allege that the road was built in a negligent manner. Defendant moved for summary judgment on the ground that the Spartanburg Connector was a public road, barring any right to compensation based solely on the change in grade.

When a public highway is established, whether by dedication, by prescription, or by the exercise of eminent domain, the public easement thus acquired by a governmental agency includes the right to establish a grade in the first place, and to alter it at any future time, as the public necessity and convenience may require. Consequently, it is the rule with us, and very generally held elsewhere, that, unless otherwise provided by



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statute or constitutional provision, an abutting property owner, even if he owns the fee of the land within the highway, may not recover for damages to his land caused by a municipal corporation or the State Highway Commission changing the grade of an established street or highway, when said change is made pursuant to lawful authority and for a public purpose, and there is no negligence in the manner or method of doing the work. Any diminution of access by an abutting landowner is *damnum absque injuria*. . . . Incidental interference with the abutting owner's easements of light, air, and access by reason of the change of grade does not entitle him to compensation, in the absence of a constitutional or statutory liability.

*Smith v. State Highway Commission*, 257 N.C. 410, 414, 126 S.E.2d 87, 90 (1962) (citations and quotation marks omitted).

This rule also applies to grading work performed by a private company acting under the authority of a city. *Wood v. Duke Land & Imp. Co.*, 165 N.C. 367, 371, 81 S.E. 422, 423 (1914) (holding that the defendants, were, “as agents of the city, only doing a lawful thing in a lawful way, and, if harm came to plaintiff’s property under such circumstances, it must be considered as *damnum absque injuria*, and giving him no legal right to redress.” (citations omitted)). Of course, liability is only barred if the road being graded is a public road. See *Smith*, 257 N.C. at 414, 126 S.E.2d at 90 (“When a *public* highway is established . . .” (emphasis added)). Thus, the dispositive question in this case becomes: is the Spartanburg Connector a public road? Plaintiffs claim that there is at least a genuine issue of material fact as to whether it is a public road. We disagree.

### C. Offer and Acceptance of Dedication

“Because North Carolina does not have statutory guidelines for dedicating streets to the public, the common law principles of offer and acceptance apply.” *Tower Development Partners v. Zell*, 120 N.C. App. 136, 140, 461 S.E.2d 17, 20 (1995) (citation omitted), *app. dismissed*, 342 N.C. 897, 471 S.E.2d 64 (1996). There is no debate that the original subdivider offered to dedicate the right-of-way on which the Spartanburg Connector is situated by recording a plat showing such a right-of-way. The question is whether that dedication was accepted.

The dedication is only complete . . . when the offer is accepted in some proper way by the responsible public

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authority. Acceptance may be manifested not only by maintenance and use as a public street, but by official adoption of a map delineating the area as a street, followed by other official acts recognizing its character as such.

*Id.* at 141, 461 S.E.2d at 21 (citations omitted).

Here, the zoning ordinance adopted by the city on 3 May 2007 “incorporated a map depicting defendant’s property, including the forty-foot road in Jackson Farms Subdivision as the connector street between Old Spartanburg Highway and Spartanburg Highway/U.S. 176.” *White I*, 2011 WL 721051 at \*1. A zoning map is one type of official map that may delineate a public road. *Tower Development Partners*, 120 N.C. App. at 141, 461 S.E.2d at 21. The only remaining question is whether there are sufficient “other official acts recognizing” the Spartanburg Connector’s character as a public street. *Id.*

The City held a hearing on a rezoning application made by defendant that requested the City rezone the area to Planned Commercial Development. Part of the planned development was construction of the Spartanburg Connector, which extended the then-undeveloped Chadwick Avenue. Although the City did not initiate the Spartanburg Connector project, the City Council specifically noted that the project was in furtherance of the City’s Southside Transportation Study, adopted in 2006. The City Council voted to support defendant’s project and adopted the new zoning ordinance, including the map showing the Spartanburg Connector.

Defendant and the City originally planned to construct the road and have it adopted by the N.C. Department of Transportation (NCDOT). NCDOT indicated, however, that it would only accept the road if it had three lanes, which was not practical in the right-of-way at issue. At a hearing on the proposed cost-sharing agreement between the City and defendant, the City was informed that “the developer wants to proceed with the project and it will be up to the City to enter the cost-share agreement and maintain the roadway.” A representative of defendant “suggested changing the language [of the cost-sharing agreement] to indicate the money will be paid to the developer upon completion and acceptance by the City.” Even in light of this new information, the City Council voted to proceed with the project and approve an agreement with defendant where the City would pay 66% of the costs of construction.

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The cost-sharing agreement shows that a site plan describing the Spartanburg Connector was submitted to and approved by the City. The agreement specifically required defendant to build the road to NCDOT specifications. In its agreement with defendant, the City noted that the improvement of the road “will inure to the safety and welfare of the City and its citizens and visitors.” Although the agreement does not include the suggested language indicating that payment would be made upon completion and acceptance by the City, it does omit the originally proposed language which would condition the City’s obligation to pay defendant “[u]pon acceptance and approval by NCDOT.”

The City’s recognition of the Spartanburg Connector as a public street is further manifested by the affidavit submitted by W. Bowman Ferguson, the city manager of the City of Hendersonville. Mr. Ferguson averred that

[a]t the completion of construction of the roadway referred to in the [cost-sharing agreement], the City observed the construction project and determined that the construction satisfies the terms of the [agreement] . . . . [and that] [i]t is the intention of the City of Hendersonville hereafter to maintain the [Spartanburg Connector] so constructed as a part of the public street system of the City of Hendersonville and it has been or will shortly be added to the list of Powell Bill Streets maintained by the City.

These acts show that the City intended to accept the street, and “maintain the roadway” once complete, assuming everything was built to the agreed specifications. There is no evidence that the construction deviated from either the specifications or the standard of reasonable care.

Plaintiffs did submit a contrary affidavit regarding the character of the road. However, the relevant statements in Mr. White’s affidavit are merely general denials, reassertions of his pleadings, or legal conclusions. For instance, Mr. White averred, in part:

11. That at all times prior to the Defendant’s said actions the road located upon the Right-of-Way has never been accepted by Henderson County, North Carolina, by the City of Hendersonville, North Carolina, by the State of North Carolina, by the United States of America, or by any department or agency thereof.

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. . . .

13. That at all times pertinent to this action the Right-of-Way has been a private road right-of-way for the benefit of the Plaintiff's Property and the other lots depicted on the Subdivision plat.

"Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein." N.C. Gen. Stat. § 1A-1, Rule 56(e) (2009). None of Mr. White's relevant averments set forth any more specific facts than the general allegations of the complaint. Indeed, these assertions are nearly identical to those made in the complaint. They do not specifically contradict any fact or piece of evidence submitted by defendant. Further, it is unclear how Mr. White would have any personal knowledge of whether or not the City had ever accepted the right-of-way.

The only other evidence about the private nature of the right-of-way concerns the City's refusal to maintain the unimproved road prior to the present construction. There is no evidence that the City has refused to accept the completed road or that either the City or defendant intended that the road remain a private right-of-way. Plaintiff White's assertions alone do not create a genuine issue of material fact as to whether the City accepted the Spartanburg Connector by agreeing to fund the construction of the road and to maintain it after completion. "Where the moving party offers facts and the opposing party only offers mere allegations, there is no *genuine* issue as to a material fact." *Moore v. Fieldcrest Mills, Inc.*, 36 N.C. App. 350, 353, 244 S.E.2d 208, 210 (1978) (emphasis in original), *aff'd*, 296 N.C. 467, 251 S.E.2d 419 (1979). The only disagreement here is about the legal conclusions to be drawn from the material facts submitted to the court.

We hold that there is no genuine issue of material fact and that the City accepted the dedication of the Spartanburg Connector by adopting an official zoning map showing that road, signing a contract to pay for two-thirds of the cost of building the road, approving the designs of the road, and indicating that it was satisfied with the construction and intended to maintain the road. *See Tower Development Partners*, 120 N.C. App. at 141, 461 S.E.2d at 21.

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The right of the government to establish roads “includes the right to establish a grade in the first place.” *Smith*, 257 N.C. at 414, 126 S.E.2d at 90.

If it were a person who had no right to do the act, and the same were done in its behalf, it would be a joint trespasser with the defendant, but having that right, *the defendant is relieved of liability if he assumed to do it for and on behalf of the city*. The city has assumed any liability which may have accrued to defendant, and now this liability would be only for injuries sustained by reason of unskillfulness in the work.

*Wolfe v. Pearson*, 114 N.C. 621, 631, 19 S.E. 264, 266 (1894) (emphasis added). We conclude that in constructing this new road, defendant was acting “pursuant to lawful authority [of the City] and for a public purpose.” *Smith*, 257 N.C. at 414, 126 S.E.2d at 90.

The fact that a private party also benefitted from the construction of the road and paid part of the cost thereof does not alter this conclusion. *See Wood*, 165 N.C. at 370, 81 S.E. at 423 (“While the testimony shows that defendant company was active in procuring the order for lowering the grade and received some benefit from it, this was only as another abutting owner, and it also appears that the change was made under authority regularly conferred by the city government, and the work was done under the immediate direction of the city engineer, or certainly in accordance with a survey and plans supplied by him, and there is no allegation or proof that there was any negligence in the plan or execution of the work.”). To hold otherwise would render this long-standing rule largely ineffectual because nearly every time a road is constructed some private party will benefit.

We hold that defendant was acting pursuant to authorization of the City and for a public purpose in constructing the Spartanburg Connector and changing the grade of the unimproved Chadwick Avenue. Plaintiffs never alleged that the construction was performed negligently. Thus, plaintiffs are not entitled to compensation because their alleged loss of convenient access to one of the two roadways abutting their property was *damnum absque injuria* (loss without injury), and the trial court did not err in granting defendant’s motion for summary judgment. *See id.* at 371.

## YINGLING v. BANK OF AM.

[225 N.C. App. 820 (2013)]

## IV. Conclusion

We conclude that there is no genuine issue of material fact regarding the public nature of the Spartanburg Connector (also known as Chadwick Avenue Extended). We hold that because the City adopted an official map showing the Spartanburg Connector, and because there were other official acts recognizing the character of that street as a public street, the Spartanburg Connector is a public street. The right of a city to grade its streets “includes the right to establish a grade in the first place.” *Smith*, 257 N.C. at 414, 126 S.E.2d at 90. Any inconvenience suffered by plaintiffs as a result of the grading of the road authorized by the city is *damnum absque injuria* (loss without injury) and not compensable absent proof of negligence.<sup>2</sup> *Wood*, 165 N.C. at 370, 81 S.E. at 423. Therefore, we affirm the trial court’s order granting defendant’s motion for summary judgment.

AFFIRMED.

Judges HUNTER, JR., Robert N. and DAVIS concur.

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JAMES YINGLING, EMPLOYEE, PLAINTIFF

v.

BANK OF AMERICA, EMPLOYER, SELF-INSURED (GALLAGHER BASSETT  
SERVICES, INC., SERVICING AGENT), DEFENDANT

No. COA12-1031

Filed 5 March 2013

**1. Workers’ Compensation—injury—written notice—reasonable excuse for delay—no prejudice**

The Industrial Commission did not err in a workers’ compensation case by concluding that that plaintiff worker’s 2006 injury was compensable. The findings supported the conclusion that plaintiff had a reasonable excuse for delay in filing written notice and defendant was not prejudiced by the delay.

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2. Given our holding, we need not reach the issue of the extent to which defendant would be entitled to borrowed governmental immunity in the event plaintiffs had alleged negligence.

## YINGLING v. BANK OF AM.

[225 N.C. App. 820 (2013)]

**2. Workers' Compensation—injury—aggravation of pre-existing condition**

The Industrial Commission did not err in a workers' compensation case by concluding that plaintiff worker's 2008 injury was compensable. Dr. Lane's testimony, which the Full Commission found credible and relied upon, was competent evidence that supported the finding that plaintiff's 2008 injury materially aggravated his pre-existing condition.

**3. Workers' Compensation—directing medical treatment—discretion of Commission**

The Industrial Commission did not abuse its discretion in a workers' compensation case by approving Dr. Lane as plaintiff worker's treating physician. Approval of an employee-selected physician is left to the sound discretion of the Commission.

Appeal by defendant from Opinion and Award entered 3 April 2012 by the North Carolina Industrial Commission. Heard in the Court of Appeals 31 January 2013.

*Kathleen Shannon Glancy, P.A., by Kathleen Shannon Glancy, for plaintiff-appellee.*

*Hedrick Gardner Kincheloe & Garofalo, LLP, by M. Duane Jones and Justin D. Robertson, for defendant-appellant.*

STROUD, Judge.

Bank of America ("defendant") appeals from the 3 April 2012 Opinion and Award granting James Yingling ("plaintiff") compensation for 2006 and 2008 work-related injuries and approving Dr. Joseph Lane as plaintiff's treating physician. Defendant argues on appeal that plaintiff's 2006 injury is not compensable because he failed to give written notice without reasonable excuse, that they were prejudiced by the two-year delay, that the Full Commission erred in concluding otherwise, and that the Full Commission's findings on this issue do not support its conclusions. Defendant further argues that the findings of the Full Commission as to plaintiff's 2008 injuries are not supported by the evidence and that the Commission erred in approving Dr. Lane as a treating physician. For the following reasons, we hold that the Full Commission's findings as to the 2006 injury supported its conclusions, that its findings as to the 2008 injury were supported by the evidence, and that the Commission did not err in approving Dr. Lane as a treating physician. Therefore, we affirm the Opinion and Award.

**YINGLING v. BANK OF AM.**

[225 N.C. App. 820 (2013)]

**I. Introduction**

Plaintiff began working for defendant in 2005 as a client manager and a support associate. Plaintiff worked with clients to provide various banking and financial services. In July 2005, plaintiff fell from a ladder in his home's backyard and injured his back. Plaintiff sought treatment for the injury and was able to engage in normal activity again within a year.

On 29 November 2006, plaintiff had a meeting at work in one of defendant's buildings. After plaintiff delivered doughnuts and coffee to the morning meeting, he went to move his car to another lot because he had parked in a spot reserved for senior managers. As plaintiff was driving through an intersection, his car was hit by another driver who ran a red light.

Plaintiff contacted his supervisor and the branch manager, who both came to the scene of the accident and helped plaintiff retrieve his items from the vehicle. Plaintiff also reported the accident to his manager in Charlotte. Plaintiff did not file any written notice of the incident with defendant at that time. Later that same day, plaintiff began feeling back pain again and went to Wrightsville Family Practice for treatment. Over the next several months, plaintiff sought treatment for his back pain at a variety of facilities and with several physicians. Despite the treatments, plaintiff continued to experience significant pain through December 2007.

In December 2007, plaintiff visited Dr. Lane at the Hospital for Special Surgery in New York. After speaking with and examining plaintiff, Dr. Lane recommended physical therapy and other conservative treatment to address plaintiff's continuing back pain. Plaintiff continued to work for defendant throughout this period.

On 13 June 2008 plaintiff slipped and fell on a recently-waxed floor while at work. This fall caused plaintiff "considerable" pain in his back and down his legs. Plaintiff again sought treatment from Dr. Lane, who recommended more invasive treatment, including spinal surgery. Despite a successful surgery, which helped mitigate some of plaintiff's pain, plaintiff continued to experience considerable discomfort. Plaintiff has not worked for defendant since the 2008 fall.

Plaintiff filed written notice of a claim for the 2008 injury on 1 August 2008 and written notice of a claim for the 2006 injury on 16 October 2008. Defendant denied both claims. The claims were heard by Deputy Commissioner James C. Gillen, who found both claims



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compensable and awarded plaintiff total disability compensation, as well as medical and psychological expenses and attorney's fees, by Opinion and Award entered 19 September 2011. Defendant appealed to the Full Commission, which found plaintiff's injuries compensable and granted plaintiff total disability, all medical and psychological care incurred as a result of both injuries, and attorney's fees by Opinion and Award entered 3 April 2012. Defendant filed written notice of appeal to this Court on 3 May 2012.

## II. Compensability of Plaintiff's Injuries

## A. Standard of Review

The standard of review in workers' compensation cases has been firmly established by the General Assembly and by numerous decisions of this Court. Under the Workers' Compensation Act, the Commission is the sole judge of the credibility of the witnesses and the weight to be given their testimony. Therefore, on appeal from an award of the Industrial Commission, review is limited to consideration of whether competent evidence supports the Commission's findings of fact and whether the findings support the Commission's conclusions of law. This [C]ourt's duty goes no further than to determine whether the record contains any evidence tending to support the finding.

*Richardson v. Maxim Healthcare/Allegis Group*, 362 N.C. 657, 660, 669 S.E.2d 582, 584 (2008) (citations, quotation marks, and brackets omitted).

## B. 2006 Injury

**[1]** Defendant argues that plaintiff is not entitled to compensation for his 2006 injury because he failed to provide timely written notice without reasonable excuse and that it was prejudiced by the delay. Plaintiff counters that he gave defendant immediate actual notice of the accident, which constitutes a reasonable excuse for the nearly two-year delay in providing written notice, and that defendant cannot show any prejudice.

As a general rule, to be entitled to recover workers' compensation benefits, an employee injured in a work-related accident must give the employer written notice of the accident as soon as practicable or "within 30 days after the occurrence of the accident or death, unless reasonable excuse is made to the satisfaction of the Industrial

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Commission for not giving such notice and the Commission is satisfied that the employer has not been prejudiced thereby.” N.C. Gen. Stat. § 97-22 (2009). Our Supreme Court has decided two cases addressing this issue in the past several years—*Richardson v. Maxim Healthcare/Allegis Group*, 362 N.C. 657, 669 S.E.2d 582 (2008) and *Gregory v. W.A. Brown & Sons*, 363 N.C. 750, 688 S.E.2d 431 (2010) (*Gregory I*). In *Richardson*, the Court held:

“The plain language of section 97-22 requires an injured employee to give written notice of an accident unless it can be shown that the employer, his agent or representative, had knowledge of the accident. When an employer has actual notice of the accident, the employee need not give written notice, and therefore, the Commission need not make any findings about prejudice.”

*Richardson*, 362 N.C. at 663, 669 S.E.2d at 586 (citations, quotation marks, and emphasis omitted). But in *Gregory*, the Court noted that

[n]ot every instance of actual notice will satisfy the statutory requirements of reasonable excuse and lack of prejudice. The Industrial Commission is therefore obligated to apply the test *in each case in which timely written notice of the accident is lacking*, and the Commission *cannot award compensation in such a case unless it concludes as a matter of law that the absence of such notice is reasonably excused and that the employer has not been prejudiced*. Further, because the right to compensation of an employee who did not give timely written notice depends on the Commission’s conclusions on these legal issues, the Commission must support those conclusions with appropriate findings of fact as detailed above.

*Gregory I*, 363 N.C. at 762, 688 S.E.2d at 440 (emphasis added).

To some extent, *Richardson* and *Gregory I* appear inconsistent; in fact, the dissent in *Gregory I* claims that the majority has “essentially overrule[d] *Richardson* just one year later, while claiming not to do so, in order to reach a particular outcome” and “add[ed] nothing but confusion and inconsistency to our own jurisprudence.” *Id.* at 764, 688 S.E.2d at 441 (Hudson, J., dissenting). Yet this Court is bound to follow both *Richardson* and *Gregory I*, so our task is to reconcile the two cases.

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The Supreme Court in *Gregory I* distinguished *Richardson* on the basis that in *Richardson* the issue of notice was not contested, whereas in *Gregory I* it was. *See id.* at 759-60, 688 S.E.2d at 438 (“It was uncontested that the defendants in [*Richardson*] had actual notice of the plaintiff’s accident, and in light of that actual notice, the Commission concluded that the defendants were not prejudiced by the delay in written notice. . . . [T]he most important factual difference between *Richardson* and the instant case . . . concerns whether the parties disputed the issue of actual notice.”). The *Gregory I* court also noted the differences in the facts of the two cases. In *Richardson*, the plaintiff was injured in an automobile accident, “which was a discrete occurrence resulting in relatively certain injuries.” *Id.* at 760, 688 S.E.2d at 438. In *Gregory I*, the plaintiff’s back pain developed over an extended period of time, and “[t]he timing of plaintiff’s injury was uncertain both because of the discrepancy in the evidence as to the time and place of the injury and because plaintiff continued reporting for work after her accident.” *Id.* Factually, the circumstances of the 2006 automobile accident here are quite similar to *Richardson*, as plaintiff’s automobile accident was “a discrete occurrence resulting in relatively certain injuries,” despite his prior back problems from his July 2005 fall at home. *Id.*

As directed by *Gregory I*, we read the two clauses of N.C. Gen. Stat. § 97-22 separately. *Id.* at 759, 688 S.E.2d at 437-38 (“The language following the semicolon initially provides that ‘no compensation shall be payable unless such written notice is given within 30 days after the occurrence of the accident or death.’ In other words, the language after the semicolon applies to all workers’ compensation benefits, regardless of whether they accrue before or after the giving of written notice.” (citation and emphasis omitted)). To put this in context, the entire statute provides as follows:

Every injured employee or his representative shall immediately on the occurrence of an accident, or as soon thereafter as practicable, give or cause to be given to the employer a written notice of the accident, and the employee shall not be entitled to physician’s fees nor to any compensation *which may have accrued under the terms of this Article prior to the giving of such notice*, unless it can be shown that the employer, his agent or representative, had *knowledge of the accident*, or that the party required to give such notice had been prevented from doing so by reason of physical or mental

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incapacity, or the fraud or deceit of some third person; *but no compensation* shall be payable unless such written notice is given within 30 days after the occurrence of the accident or death, unless reasonable excuse is made to the satisfaction of the Industrial Commission for not giving such notice and the Commission is satisfied that the employer has not been prejudiced thereby.

N.C. Gen. Stat. § 97-22 (emphasis added).

The statute differentiates between compensation and medical expenses which accrue prior to the employer's receipt of written notice and *all* compensation, which includes any benefits which might accrue at any time after the injury by accident. As to the benefits which accrue prior to written notice, the employee must show that the employer did have actual knowledge of the accident, unless this notice was prevented by "physical or mental incapacity" or "fraud or deceit of some third person." *Id.* As to all benefits, including those accruing both before and after the employer receives written notice, the notice is required within 30 days of the accident unless the employee shows a "reasonable excuse . . . to the satisfaction of the Industrial Commission" for the delay in notice and the employer was not prejudiced by the delay. *Id.*

Thus, if a plaintiff is seeking compensation for disability benefits or expenses incurred prior to written notice being given, the plaintiff must show that the employer had actual knowledge of the accident, or that one of the other enumerated exceptions applies. *Gregory I*, 363 N.C. at 759, 688 S.E.2d at 437; N.C. Gen. Stat. § 97-22 ("[T]he employee shall not be entitled to physician's fees nor to any compensation *which may have accrued under the terms of this Article prior to the giving of such notice*, unless it can be shown that the employer, his agent or representative, had knowledge of the accident, or that the party required to give such notice had been prevented from doing so by reason of physical or mental incapacity, or the fraud or deceit of some third person." (emphasis added)).

Further, in *every* case where the plaintiff is seeking compensation for an accident not reported in writing within 30 days the Industrial Commission must make findings and legal conclusions both as to whether the plaintiff has shown a reasonable excuse for the delayed notice *and*, unless the issue of actual notice is uncontested, as to whether defendant has shown prejudice from the delay. *Gregory I*, 363 N.C. at 759-61, 688 S.E.2d at 437-39; N.C. Gen. Stat.

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§ 97-22 (“[N]o compensation shall be payable unless such written notice is given within 30 days after the occurrence of the accident or death, unless reasonable excuse is made to the satisfaction of the Industrial Commission for not giving such notice and the Commission is satisfied that the employer has not been prejudiced thereby.”). These findings must be supported by the evidence. *See Richardson*, 362 N.C. at 660, 669 S.E.2d at 584.

In this case, plaintiff seeks compensation and medical expenses incurred both prior to defendant’s receipt of written notice as well as compensation and medical expenses incurred after the notice and into the future. The Commission concluded that plaintiff had shown a reasonable excuse and that defendant was not prejudiced by the delay in receipt of written notice because it found that defendant had received actual notice the day of the accident. Defendant argues that the finding of actual notice was unsupported by the evidence and that the Commission’s findings that plaintiff had shown a reasonable excuse and that defendant had not been prejudiced by the delay were not supported by the findings.<sup>1</sup> Because we conclude that the Commission’s finding of actual notice is supported by the evidence, that this finding supports the conclusion that plaintiff had shown a reasonable excuse, and that the findings support the Commission’s conclusion on the issue of prejudice, we affirm the Opinion and Award as to the 2006 injury.

i. Actual notice and reasonable excuse

Under N.C. Gen. Stat. § 97-22, the first portion of the inquiry is whether defendant had “knowledge of the accident,” or actual notice of the accident, as this is necessary for plaintiff to recover benefits accruing prior to written notice, absent one of the exceptions in the statute. Further, in order for plaintiff to recover any benefits, he must show “reasonable excuse” for the delay in written notice. As both the parties and the Commission addressed the issues of “knowledge of the accident” and “reasonable excuse” together based upon the facts of this case, we will also, although we note that they are actually discrete issues legally.

“Section 97-22 gives the Industrial Commission the discretion to determine what is or is not a ‘reasonable excuse.’ N.C. Gen. Stat.

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1. In their briefs, the parties do not distinguish between the expenses incurred prior to written notice being given and those incurred after, but their arguments do address all three issues: actual notice of the accident, reasonable excuse for delay in written notice, and prejudice.

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§ 97-22 ('[U]nless reasonable excuse is made *to the satisfaction of the Industrial Commission . . .*').” *Chavis v. TLC Home Health Care*, 172 N.C. App. 366, 377, 616 S.E.2d 403, 412 (2005), *app. dismissed*, 360 N.C. 288, 627 S.E.2d 464 (2006).

A ‘reasonable excuse’ has been defined by this Court to include a belief that one’s employer is already cognizant of the accident or where the employee does not reasonably know of the nature, seriousness, or probable compensable character of his injury and delays notification only until he reasonably knows. The burden is on the employee to show a ‘reasonable excuse.’

*Jones v. Lowe’s Companies, Inc.*, 103 N.C. App. 73, 75, 404 S.E.2d 165, 166 (1991) (citations, quotation marks, ellipses, and brackets omitted).

Here, the Full Commission concluded that plaintiff had a reasonable excuse for delay because he “gave immediate actual notice to two managers of defendant and he did not know of the compensable character of his injury” and because he did not know that his injury was compensable under the Workers’ Compensation Act. Defendant argues that the Commission’s conclusion was erroneous for two reasons. First, defendant argues that the evidence did not support the finding of actual notice because plaintiff did not report that his accident was work-related to his supervisors, and that actual notice of the *accident* is not the same as notice of a *work-related injury*. Second, defendant contends that plaintiff’s lack of awareness that his injury would be compensable under the Workers’ Compensation Act is not sufficient to justify a conclusion that his delay was reasonable.

We first address the issue of “knowledge of the accident,” or actual notice. In unchallenged findings of fact number 4 and 6, the Commission found:

4. On November 29, 2006, plaintiff was injured in a motor vehicle accident while working for defendant. The accident occurred when plaintiff was moving his vehicle from a parking lot adjacent to defendant’s building to another parking location during the work day. On that morning, plaintiff parked his car in the lot adjacent to defendant’s building so as to provide and carry doughnuts and coffee for an 8:00 a.m. meeting. After the meeting, plaintiff was required to move his car to another parking location because the adjacent lot he

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used prior to the meeting contained only a small number of spaces, which were assigned to senior managers. In the process of moving his car, plaintiff was involved in a collision when he drove through an intersection and his car was struck by another driver who ran a red light. Following the motor vehicle accident, plaintiff contacted his supervisor Tom Dodson from the accident scene. Mr. Dodson and the branch manager came to the scene and helped plaintiff retrieve items from his vehicle. Plaintiff also reported the accident to Debra Pickens, his manager in Charlotte.

....

6. Plaintiff missed only a handful of days from work in the wake of the November 29, 2006 motor vehicle accident, as he was able to adjust his work schedule around his medical appointments. Plaintiff used sick time and was paid for these days. Plaintiff testified before the Deputy Commissioner that he did not immediately file [a] claim because he was unfamiliar with the Workers' Compensation Act and didn't realize that he may be entitled to benefits under the Act. Following the November 29, 2006 motor vehicle accident, plaintiff continued to get good performance reviews from defendant.

The Commission then found

that defendant had actual notice and knowledge of the accident and of plaintiff's resulting injury. This notice came when Mr. Dodson and defendant's branch manager came to the scene immediately after the motor vehicle accident, and also when plaintiff called and reported the accident to Debra Pickens, his manager in Charlotte.

Defendant argues that notifying a manager of an accident is not the same as notifying him of a work-related injury and that therefore the evidentiary facts found do not support the ultimate finding of actual notice. Defendant cites a footnote from *Gregory I* in support of its argument. Defendant argues that the Supreme Court noted that "[a]n employer's notice of an employee's 'accident,' standing alone, does not necessarily trigger any statutory duties for the employer." *Gregory I*, 363 N.C. at 763, 688 S.E.2d at 440 n.1. This is true, but

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Defendant omits the sentence preceding the one quoted; it states that “[u]nlike ‘accident,’ ‘injury’ is a defined term under the Workers’ Compensation Act, meaning ‘only injury by accident arising out of and in the course of the employment.’ [N.C. Gen. Stat.] § 97-2(6) (2007).” *Id.*

Defendant is correct that the definitions of “accident” and “injury” are different.

The Workers’ Compensation Act extends coverage only to an “injury by accident arising out of and in the course of the employment [.]” N.C. Gen.Stat. § 97-2(6) (2003). Injury and accident are separate concepts, and there must be an accident which produces the injury before an employee can be awarded compensation.

*Swift v. Richardson Sports, Ltd.*, 173 N.C. App. 134, 138, 620 S.E.2d 533, 536 (2005) (citation omitted). An “accident,” for purposes of workers’ compensation, has been variously “defined as[:] ‘an unlooked for and untoward event which is not expected or designed by the injured employee[;]’ ‘[a] result produced by a fortuitous cause[;]’ ‘[a]n unexpected or unforeseen event[;]’ [and] ‘[a]n unexpected, unusual or undesigned occurrence.’” *Edwards v. Piedmont Publishing Co.*, 227 N.C. 184, 186, 41 S.E.2d 592, 593 (1947) (citations omitted).

N.C. Gen. Stat. § 97-22 states that the employer must have “knowledge of the *accident*,” it does not require knowledge of a “work-related injury” as argued by defendant. Our prior cases have recognized that the employer’s knowledge of the employee’s “unexpected or unforeseen event,” or accident, along with knowledge that the employee was injured to some degree by this event, is sufficient. *See, e.g., Legette v. Scotland Memorial Hosp.*, 181 N.C. App. 437, 447, 640 S.E.2d 744, 751 (2007) (holding that evidence that the plaintiff verbally informed her supervisor of the accident and that plaintiff’s supervisor accompanied her to the emergency room supported a finding that the defendant had actual notice), *disc. rev. denied*, 362 N.C. 177, 658 S.E.2d 273 (2008), and *Chilton v. Bowman Gray School of Medicine*, 45 N.C. App. 13, 18, 262 S.E.2d 347, 350 (1980) (holding that there was evidence of actual notice where employees of the defendant were present at the picnic where the plaintiff broke his ankle while playing volleyball and had personal knowledge of the accident).



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Moreover, the Supreme Court in *Gregory I* did not hold that the Commission's findings on actual notice were inadequate. The only issue before the Court was whether findings as to prejudice are required where actual notice is found. *See Gregory I*, at 363 N.C. 764, 688 S.E.2d at 440-41. The Supreme Court reversed and remanded because the Commission had failed to make *any* conclusions of law or findings of fact as to whether the defendant was prejudiced by the delay. *See id.* at 764, 688 S.E.2d at 440 ("The Full Commission in this case erred in awarding benefits to plaintiff without concluding that defendants were not prejudiced by plaintiff's failure to give written notice within thirty days after her accident and without supporting such a conclusion with appropriate findings of fact."). This Court's holding affirming the conclusion that the plaintiff had shown a reasonable excuse based on actual notice was left undisturbed. *Id.* at 764, 688 S.E.2d at 440-41; *Gregory v. W.A. Brown & Sons*, 192 N.C. App. 94, 106, 664 S.E.2d 589, 596 (2008), *rev'd in part*, *Gregory I*, 363 N.C. at 764, 688 S.E.2d at 440-41.

Here, the Commission found that plaintiff immediately contacted three agents of defendant and informed them of the automobile accident. The uncontested findings show that the accident occurred during the workday, that the branch manager and defendant's supervisor went to the scene of the accident, and that plaintiff contacted his manager in Charlotte and informed her of his car accident that same day. Although plaintiff did not immediately seek medical treatment, he did soon after the accident, and he notified defendant of his need to be absent from work to attend medical appointments. Although the Commission did not make any findings about the precise words that plaintiff used to notify defendant about the accident, there is no evidence that plaintiff ever denied that the accident was work-related. Additionally, there is no contention that plaintiff was going home or attending to some personal errand at the time of the accident. These facts support the Commission's ultimate finding that defendant had actual knowledge of plaintiff's accident and that finding supports the conclusion that plaintiff had a reasonable excuse for his delay in providing written notice. *See Legette*, 181 N.C. App. at 447, 640 S.E.2d at 751; *Chilton*, 45 N.C. App. at 18, 262 S.E.2d at 350. This actual notice satisfies both the requisite "knowledge of the accident" for plaintiff to recover expenses incurred prior to written notice being given and the "reasonable excuse" prong of the ultimate two-part test under N.C. Gen. Stat. § 97-22.

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A plaintiff does not have to show both that the employer had “actual knowledge of the accident” *and* that the employee did not “reasonably know of the . . . probable compensable character of his injury and delays notification only until he reasonably knows.” *Lawton v. Durham County*, 85 N.C. App. 589, 592, 355 S.E.2d 158, 160 (1987) (citation omitted). Rather, he need only show the Commission that he had a reasonable excuse for delay in providing written notice. *See Jones*, 103 N.C. App. at 75, 404 S.E.2d at 166. Having held that the Commission’s findings on actual notice support its conclusion that plaintiff has shown a reasonable excuse for delay, we need not decide whether plaintiff’s ignorance of the workers’ compensation system constitutes lack of knowledge of the probable compensable character of his injury. We now turn to the issue of prejudice.

## ii. Prejudice by the delayed written notice

A defendant-employer bears the burden of showing that it was prejudiced. If the defendant-employer is able to show prejudice by the delayed written notice, the employee’s claim is barred, even though the employee had a reasonable excuse for not providing written notice within 30 days, as required by statute. Our Courts have noted the purpose of providing the employer with written notice within 30 days of the injury in accordance with the statute is twofold: First, to enable the employer to provide immediate medical diagnosis and treatment with a view to minimizing the seriousness of the injury; and second, to facilitate the earliest possible investigation of the facts surrounding the injury. Thus, in determining whether prejudice occurred, the Commission must consider the evidence in light of this dual purpose. In addition, our Courts have found that where the employer is on actual notice of the employee’s injury soon after it occurs, and soon enough for a thorough investigation, defendant-employer is not prejudiced by plaintiff’s failure to provide timely written notice.

*Gregory II*, \_\_\_ N.C. App. at \_\_\_, 713 S.E.2d at 74 (citations and quotation marks omitted).

The Commission concluded that defendant “[was] not prejudiced because they [sic] had immediate actual notice and could have investigated the incident.” Defendant argues that it was prejudiced by plaintiff’s delay in filing written notice of the 2006 injury because it

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was unable to effectively investigate plaintiff's claim two years later, plaintiff's medical costs are much higher than they otherwise would have been because he has directed all of his own medical treatment over the course of those two years, including treatment by a physician in New York, and because defendant is now unable to file a third-party claim against the driver of the vehicle who ran the red light and struck plaintiff in 2006.

In *Gregory I*, the Supreme Court noted some facts which could support a conclusion of lack of prejudice:

[F]indings of fact to the effect that an employer had actual knowledge within thirty days after an employee's accident, and that the actual knowledge included such information as the employee's name, the time and place of the injury or accident, the relationship of the injury to the employment, and the nature and extent of the injury, could support a legal conclusion that the employer was not prejudiced by the delay in written notice.

*Gregory I*, 363 N.C. at 761-62, 688 S.E.2d at 439. The Supreme Court provided this list of information to provide guidance, "not . . . to limit either deputies or the Full Commission." *Id.* at 761, 688 S.E.2d at 439. Thus, it is clear that the Commission need not make findings that the employer knew all of the above information to support a conclusion that the employer was not prejudiced.

Additionally, in *Gregory I*, the Supreme Court noted that although there were no findings of prejudice in *Richardson*, the defendant in that case had failed to show prejudice, and distinguished it from the situation in *Gregory I*:

[T]he employee in *Richardson* was involved in an automobile accident, which was a discrete occurrence resulting in relatively certain injuries. In this case, on the other hand, plaintiff had been experiencing back pain for approximately six months when her accident occurred and sought workers' compensation after she "aggravated her preexisting degenerative condition." The timing of plaintiff's injury was uncertain both because of the discrepancy in the evidence as to the time and place of the injury and because plaintiff continued reporting for work after her accident. As a result of plaintiff's actions, initial attempts by physicians to

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diagnose plaintiff's problem and determine whether it was work related were inconclusive.

*Id.* at 760, 688 S.E.2d at 438.

As noted above, the factual circumstances of the automobile accident here and in *Richardson* are quite similar, as is the length of the delay in written notice. Here, the Commission's uncontested findings show that agents of defendant went to the scene of the accident and were otherwise immediately informed thereof by plaintiff himself. The Commission also made uncontested findings that plaintiff took paid sick leave to attend his medical appointments and that a co-worker noticed that plaintiff "was in a lot more pain and was just different" after the accident. It is clear, then, that defendant knew which employee had been involved in the accident, when and where that accident had occurred, and that plaintiff was injured in a car accident as he was moving his car from defendant's parking lot to his normal work spot after delivering refreshments for a meeting. The findings do not directly mention whether defendant was aware of the extent of plaintiff's injuries. Additionally, although plaintiff had previously experienced back problems, like in *Gregory I*, the Commission found that those problems had subsided by the time of plaintiff's 2006 accident. As in *Richardson*, the car accident here "was a discrete occurrence resulting in relatively certain injuries." *Id.*

We hold that the Commission's findings support the conclusion that defendant had immediate, actual knowledge of the accident and failed to further investigate the circumstances surrounding the accident at that time. *See id.* at 761-62, 688 S.E.2d at 438. If defendant had properly investigated this accident at the time it received actual notice and accepted his claim as compensable, it could have directed plaintiff's treatment and filed a third-party complaint against the driver of the vehicle that struck plaintiff in 2006. N.C. Gen. Stat. § 97-22 requires only that the Commission be "satisfied that the employer has not been prejudiced" and under *Gregory II* the findings of fact here are sufficient to support this conclusion of lack of prejudice.

Defendant does not contend that plaintiff's injury was exacerbated by a delay in treatment because there was no delay in treatment. The Commission found, and defendant does not contest, that plaintiff first sought medical treatment the same day as the accident and continued to seek treatment in the following months until he was able to manage his pain "with physical therapy and other conservative treatments." Nor does defendant contend that plaintiff received

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improper or inappropriate medical care which may have worsened his condition instead of improving it.

As in *Gregory II*, “we hold the evidence supports the Commission’s findings that defendant-employer had actual notice of plaintiff’s injury soon after it occurred and that such actual notice under the circumstances of the present case satisfied the twin aims of providing the employer with a 30-day written notice” such that defendant cannot show that it was prejudiced by the delay. *Gregory II*, \_\_\_ N.C. App. at \_\_\_, 713 S.E.2d at 76.

C. 2008 Injury

**[2]** Defendant next argues that the Commission’s findings of fact as to plaintiff’s 2008 injury were unsupported by the evidence. Specifically, defendant argues that given plaintiff’s history of back problems, the Commission could not find that the 2008 accident materially accelerated or aggravated his pre-existing condition. Defendant also argues that Dr. Lane’s opinion that plaintiff’s pain has increased is incompetent evidence because it was based solely on plaintiff’s own reports and is inconsistent with the “objective” evidence.

One of the principal witnesses credited by the Industrial Commission was Dr. Joseph Lane. Dr. Lane is a board-certified specialist in orthopedics, attending physician at New York Presbyterian Weill, and a professor of orthopedic surgery and assistant dean at the Weill Cornell Medical College who has authored numerous publications on orthopedics. He testified that he first treated plaintiff late in 2007 for back pain. He examined plaintiff’s medical records and spoke with plaintiff about his symptoms. At that time plaintiff was experiencing knee, neck, and back pain serious enough to seek treatment, and even severe enough to impact his ability to work at times, but the pain was intermittent. At the 2007 meeting, Dr. Lane recommended physical therapy and other conservative treatment. Dr. Lane scheduled a follow-up session for July 2008. However, before that time, plaintiff slipped and fell at work. Plaintiff reported to Dr. Lane that “he was in miserable pain,” and moved his appointment up several weeks.

Dr. Lane stated that plaintiff “was a different person [at the time of the 2008 examination] than I had seen in 2007 in a number of ways,” and explained that many of plaintiff’s symptoms had become much more severe. Because of these more severe symptoms Dr. Lane recommended a decompression surgery to take pressure off of plain-

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tiff's affected nerves. Dr. Lane also examined plaintiff on two occasions after the surgery. Dr. Lane testified that the surgery went well, though plaintiff continued to suffer some numbness in his legs, discomfort at the site of the surgery, and pain in his back. Dr. Lane noted that although the surgery resulted in improvement, plaintiff "still had not gotten back to his pre-fall level." Finally, Dr. Lane opined that the 2008 fall contributed to, accelerated, and exacerbated plaintiff's pain.

Defendant, citing *Thacker v. City of Winston-Salem*, 125 N.C. App. 671, 482 S.E.2d 20, *disc. rev. denied*, 346 N.C. 289, 487 S.E.2d 571 (1997), argues that Dr. Lane's testimony was incompetent because he assumed the truth of facts that the record did not support and relied on plaintiff's "subjective reports."

In *Thacker*, the expert witness specifically testified that he could not give an opinion on whether the accident aggravated the plaintiff's pre-existing condition. *Thacker*, 125 N.C. App. at 675, 482 S.E.2d at 23. The witness only said that in a hypothetical scenario posed by plaintiff's counsel the accident *could* aggravate the plaintiff's pre-existing condition. *Id.* Here, by contrast, Dr. Lane did not merely guess or speculate, but opined, based on his actual physical examinations of plaintiff, plaintiff's reports to him, and his extensive experience and training in orthopedics, that the accident did aggravate plaintiff's pre-existing condition. Thus, defendant's reliance on *Thacker* is misplaced.

Additionally, defendant's argument that Dr. Lane's testimony is incompetent because he relied on plaintiff's reports of his pain is unconvincing. Dr. Lane treated plaintiff both before and after the 2008 accident and thus had a particularly good opportunity to evaluate plaintiff's physical condition and complaints over time. Especially when treating pain patients, "[a] physician's diagnosis often depends on the patient's subjective complaints, and this does not render the physician's opinion incompetent as a matter of law." *Jenkins v. Public Service Co. of North Carolina*, 134 N.C. App. 405, 410, 518 S.E.2d 6, 9 (1999), *disc. rev. dismissed as improvidently granted*, 351 N.C. 341, 524 S.E.2d 805 (2000).

Defendant also argues that the Commission could not find that the 2008 incident aggravated plaintiff's pre-existing condition because Dr. Lane did not examine *all* of plaintiff's medical records. This argument goes to the weight to be given to Dr. Lane's testimony, not to its competency. Defendant essentially asks us to re-weigh the evidence before the Commission based on the "objective" evidence presented.

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[T]he Commission's findings of fact are conclusive on appeal when supported by competent evidence, even though there be evidence that would support findings to the contrary. . . . [T]his Court does not have the right to weigh the evidence and decide the issue on the basis of its weight. The court's duty goes no further than to determine whether the record contains any evidence tending to support the finding.

*Hassell v. Onslow County Bd. of Educ.*, 362 N.C. 299, 305, 661 S.E.2d 709, 714 (2008) (citations and quotation marks omitted).

We hold that Dr. Lane's testimony, which the Full Commission found credible and relied upon, was competent evidence that supports the finding that plaintiff's 2008 injury materially aggravated his pre-existing condition. Therefore, we affirm the Full Commission's Opinion and Award as to the 2008 injury.

## III. Directing Medical Treatment

[3] Defendant finally argues that the Full Commission erred in approving Dr. Lane as a treating physician and that "[t]here is no statutory authority giving the Industrial Commission the authority to deem an injury compensable and then simultaneously usurp[] an employer's right to direct medical treatment."

The Commission found that "given the circumstances of this case, plaintiff's future medical care is best directed by Dr. Lane" and approved future care provided by Dr. Lane. Defendant contends that because of the 2011 changes to N.C. Gen. Stat. § 97-25 the Industrial Commission must make specific findings that support its decision to approve a physician in the first instance. Defendant cites no cases in support of this proposition.

N.C. Gen. Stat. § 97-25 now states, in part, that "[i]n order for the Commission to grant an employee's request to change treatment or health care provider, the employee must show by a preponderance of the evidence that the change is reasonably necessary to effect a cure, provide relief, or lessen the period of disability" and omits the previously included phrase "as may in the discretion of the Commission be necessary." N.C. Gen. Stat. § 97-25 (2011).

Defendant's argument fails for several reasons. First, the language concerning what an employee must show only addresses a *change* in provider, not the initial approval of a provider by the

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Commission. Second, the phrase “as may in the discretion of the Commission be necessary” omitted from the current version referred to the second sentence of § 97-25, which now provides that “in case of a controversy arising between the employer and the employee . . . the Industrial Commission may order necessary treatment.” Compare N.C. Gen. Stat. § 97-25 (2011) with N.C. Gen. Stat. § 97-25 (2009). This sentence specifically authorizes the Commission to order “necessary treatment.”

Most importantly, defendant ignores the first sentence of the cited paragraph, which states that

If the employee so desires, an injured employee may select a health care provider of the employee’s own choosing to attend, prescribe, and assume the care and charge of the employee’s case *subject to the approval of the Industrial Commission*.

N.C. Gen. Stat. § 97-25 (2011) (emphasis added). Under this provision, “[a]pproval of an employee-selected physician is left to the sound discretion of the Commission.” *Kanipe v. Lane Upholstery*, 141 N.C. App. 620, 626, 540 S.E.2d 785, 789 (2000) (citation omitted).

The language in this first sentence has not changed in relevant part since our Supreme Court interpreted § 97-25 to mean “that an injured employee has the right to procure, even in the absence of an emergency, a physician of his own choosing, subject to the approval of the Commission.” *Schofield v. Great Atlantic & Pac. Tea Co., Inc.*, 299 N.C. 582, 591, 264 S.E.2d 56, 62 (1980); see N.C. Gen. Stat. § 97-25 (2009) (“Provided, however, if he so desires, an injured employee may select a physician of his own choosing to attend, prescribe and assume the care and charge of his case, subject to the approval of the Industrial Commission.”); see also N.C. Gen. Stat. § 97-2(19) (2011) (defining medical compensation as those services “prescribed by a health care provider authorized by the employer or subsequently by the Commission.” (emphasis added)). The 2011 amendments only changed the word “physician” to “health care provider.” This change does not indicate that the Legislature intended to alter the long-standing rule that the Industrial Commission can approve a health care provider chosen by the employee.

Moreover, this Court has long held that “the right to direct medical treatment is triggered only when the employer has accepted the claim as compensable.” *Id.* at 624, 540 S.E.2d at 788. Accepting the compensability of the claim means that the defendant has taken some



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act admitting compensability such as filing a Form 21 agreement accepted by the Commission, or directly paying the plaintiff and filing a Form 60. *Id.* at 625, 540 S.E.2d at 788.

Never has this Court held that a defendant may fully contest the compensability of the claim, lose before the Full Commission, and still have a right to direct the plaintiff's treatment. Such a result would be especially inappropriate where, as here, the defendant continues to contest the compensability of the plaintiff's injury. "[U]ntil the employer accepts the obligations of its duty, i.e., paying for medical treatment, it should not enjoy the benefits of its right, i.e., directing how that treatment is to be carried out." *Id.* at 624, 540 S.E.2d at 788. Nothing in the revised statute suggests that the Legislature intended to allow the employer to enjoy the benefits of choosing a treating physician without bearing the associated obligations. The approval of a physician remains in "the sound discretion of the Commission." *Kanipe*, 141 N.C. App. at 626, 540 S.E.2d at 789.

We conclude that the Commission did not abuse its discretion in approving Dr. Lane as plaintiff's treating physician.

## IV. Conclusion

The Industrial Commission's findings support its conclusion that plaintiff had a reasonable excuse for delay in filing written notice of his 2006 injury, and that defendant was not prejudiced by the delay. There was competent evidence to support the Commission's findings as to plaintiff's 2008 injury and those findings support its conclusions. Finally, the Commission did not abuse its discretion in approving Dr. Lane as a treating physician. Therefore, we affirm the Full Commission's 3 April 2012 Opinion and Award in full.

AFFIRMED.

Judges STEPHENS and DILLON concur.

## CASES REPORTED WITHOUT PUBLISHED OPINIONS

(FILED 5 MARCH 2013)

BAINES v. BAINES No. 12-829	Durham (07CVD22)	The trial court's 24 February 2012 order finding defendant in contempt of court is AFFIRMED. The trial court's 5 March 2012 order awarding plaintiff attorney's fees is REVERSED.
BELL v. GOODYEAR TIRE & RUBBER CO. No. 12-1009	Indus. Comm. (W28869)	Affirmed
CRISWELL v. WHEATLEY No. 12-786	Mecklenburg (09CVS27560)	No Error in Part, Dismissed in Part
D.P. SOLUTIONS, INC. v. XPLORE-TECH SERV. PRIVATE LTD. No. 12-925	Guilford (10CVS4889)	Affirmed
HICKORY MOUNTAIN FARMS, LLC v. VAN VOOREN HOLDINGS, INC. No. 12-1000	Forsyth (11CVS6849)	Dismissed as interlocutory
HIGHSMITH v. CLARK No. 12-1041	Sampson (10CVS1143)	Affirmed
IN RE A.N.R. No. 12-1042	Wake (10JT270-271)	Affirmed
IN RE H.C.S. No. 12-879	Rockingham (10JA59)	Affirmed
IN RE H.N.H. No. 12-857	Yancey (08J37) (08J38)	Affirmed in part; reversed in part
IN RE K.L. No. 12-1023	Robeson (11JA312-313)	Reversed and Remanded
IN RE K.N.E.S. No. 12-1003	Cumberland (12JT110)	Affirmed

IN RE L.N.J. No. 12-920	Bertie (07J25)	Affirmed
IN RE S.J. No. 12-877	Robeson (12JA22)	Remanded
IN RE T.F. No. 12-1082	Warren (07JA43-44)	Affirmed in Part; Remanded in Part
IN RE W.D.W. No. 12-894	Gaston (05JT423)	Affirmed
MCKEE v. SMITH No. 12-1194	Onslow (08CVD5134)	Reversed
MOORE v. BELL SENIOR LIVING No. 12-440	Indus. Comm. (661765)	Affirmed
PIPPENS v. MAY No. 12-821	Pitt (10CVS1355)	Reversed
POHLMAN v. MAGEN'S BAY HOME OWNERS ASSOC., INC. No. 12-327	Carteret (10CVS280)	Affirmed
STATE v. ALSTON No. 12-815	Wilson (11CRS52262)	No error in part; vacated and remanded in part
STATE v. BALTAZAR No. 12-644	Wake (10CRS207568)	Dismissed
STATE v. BASS No. 12-828	Durham (11CRS54610)	No Error
STATE v. BOYKIN No. 12-816	Wake (10CRS212494-95)	No Error
STATE v. BRADSHAW No. 12-1010	Wake (10CRS13814) (10CRS217492)	No Error
STATE v. FARMER No. 12-1067	Cabarrus (11CRS315) (11CRS50574)	Dismissed in part and remanded
STATE v. GROSS No. 12-951	Buncombe (07CRS57096) (08CRS19-20) (08CRS204) (08CRS22)	No error in part; no prejudicial error in part

STATE v. HOGAN No. 12-835	Robeson (10CRS54206) (10CRS7825)	No prejudicial error.
STATE v. JOHNSON No. 12-1184	Mecklenburg (10CRS261770)	No Error
STATE v. MCRAE No. 12-1088	Hoke (09CRS50495) (10CRS1463)	Affirmed
STATE v. RICHARDSON No. 12-731	Pitt (09CRS56370-71) (10CRS7438-39)	No Error
STATE v. THOMAS No. 12-891	Alamance (10CRS50755)	No Error
STATE v. WHITAKER No. 12-527	Wake (10CRS219380)	No Error
WOFFORD v. COOK No. 12-966	Buncombe (08CVD3998)	Dismissed

## **HEADNOTE INDEX**



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## ADMINISTRATIVE LAW

**Certificate of need—statutory compliance**—The North Carolina Department of Health and Human Services, Division of Health Service Regulation (DHHS) did not err by issuing a final agency decision accepting an administrative law judge's recommended decision dismissing plaintiff WakeMed's challenge to the issuance of a certificate of need ("CON") to Rex Healthcare (Rex) and awarding a CON to Rex. DHHS correctly determined that it could not apply an N.C.G.S. § 131-183 (a)(13)(a) ("Criterion 13(a)") comparison to Rex's application and correctly assessed Rex's application taking into account the reason and purpose of the law. **WakeMed v. N.C. Dep't of Health and Human Servs.**, 253.

## APPEAL AND ERROR

**Appealability—challenge to indictment on its face—not raised below**—A challenge alleging that an indictment is invalid on its face may be made at any time, even if it was not contested in the trial court. **State v. Wilkins**, 492.

**Appealability—untimely appeal—non-conforming outdoor advertising sign**—Petitioner Fairway Outdoor Advertising's (Fairway) appeal in a zoning case of compliance issues with its outdoor advertising sign pursuant to the Town of Cary's land development ordinance (LDO) § 10.5.2 was not timely. Fairway did not appeal the contested action regarding its non-conforming sign until almost a year after it had received official notice that it was subject to LDO § 10.5.2. Notice of appeal was required within 30 days pursuant to LDO § 3.21.3(B). **Fairway Outdoor Adver. v. Town of Cary**, 676.

**Grounds for appeal—felony murder—no error in first-degree premeditated murder**—The issue of whether felony murder with kidnapping as the predicate felony should have been dismissed at trial was not reached where the appellate court concluded that there had been no error in the denial of defendant's motion to dismiss first-degree murder based on premeditation and deliberation. **State v. Broom**, 137.

**Grounds for appeal—prayer for judgment continued—no final judgment**—An appeal from a kidnapping conviction was not reached where the trial court entered a prayer for judgment continued without imposing any conditions, so that there was no final judgment on the charge. **State v. Broom**, 137.

**Interlocutory orders and appeals—final judgment—no just reason for delay**—The Court of Appeals addressed the merits of plaintiff's interlocutory appeal in a wills case where there was a final judgment as to two of plaintiff's five claims and the trial court certified that there was no just reason for delay of the appeal. **Hankins v. Barlett**, 696.

**Interlocutory orders and appeals—partial summary judgment—dismissal of counterclaims—final order**—The order granting defendant's motion for partial summary judgment was final and properly before the Court of Appeals. Defendant's voluntarily dismissal of its counterclaims on 17 May 2012 without prejudice had the effect of making the trial court's grant of partial summary judgment a final order. **White v. NW Prop. Grp.-Hendersonville #1, LLC**, 810.

**Interlocutory orders and appeals—substantial right—sovereign immunity—standing**—Defendants' first argument in a declaratory judgment action regarding the denial of its motion to dismiss based upon the defense of sovereign immunity affected a substantial right and was thus immediately appealable. However, defendants' second argument based upon the alleged lack of standing of plaintiff to



**APPEAL AND ERROR—Continued**

bring the present action was dismissed because it did not affect a substantial right. **Richmond Cnty. Bd. of Educ. v. Cowell, 583.**

**Interlocutory orders—dismissal of only one defendant—substantial risk of inconsistent verdicts**—An order in a negligence case arising from a logging site accident did not dispose of the entire case and was interlocutory where the claim against only one of the defendants was dismissed. However, there was a substantial risk of inconsistent verdicts from separate trials and the appeal was heard on the merits. **Overton v. Evans Logging, Inc., 74.**

**Interlocutory orders—governmental immunity**—Defendant city's appeal from the trial court's interlocutory order denying its motion to dismiss was heard by the Court of Appeals because the order implicated a local government body's governmental immunity. **Greene v. City of Greenville, 24.**

**Interlocutory orders—partial summary judgment—anti-deficiency statute—substantial right**—Although defendant's appeal from the grant of partial summary judgment in favor of plaintiff was from an interlocutory order, the issue of whether the trial court violated North Carolina's anti-deficiency statute by granting a monetary judgment on a purchase money note affected a substantial right, thus entitling defendant to immediate review. **Rutherford Plantation, LLC v. Challenge Golf Grp. of the Carolinas, LLC, 79.**

**Interlocutory orders—substantial right—denial of motion to compel arbitration**—The denial of a motion to compel arbitration, although interlocutory, is immediately appealable because it affects a substantial right. **King v. Bryant, 340.**

**Interlocutory orders—substantial right—risk of inconsistent verdicts**—The Court of Appeals elected to address defendants' appeal from an interlocutory order in a Medicaid fraud investigation case so that this protracted action could move toward a final resolution despite defendants' failure to explain the risk of inconsistent verdicts in its statement of grounds for appellate review since such a risk was plainly presented in this case. **Housecalls Home Health Care, Inc. v. State, 306.**

**Interlocutory orders—workers' compensation—exclusivity provisions—substantial right**—Plaintiff's appeal from the trial court's interlocutory order granting summary judgment to defendants in a wrongful death action was immediately appealable where defendants asserted immunity under the Worker's Compensation Act. **Pender v. Lambert, 390.**

**Jurisdiction on appeal—settlement agreement**—An appeal from the denial of a motion to intervene in an interpleader action to determine the rightful beneficiary to an individual retirement account was properly before the Court of Appeals where the Estate contended that the Association's notice of appeal was filed after the named parties filed a stipulation of dismissal. The settlement was approved on the same day the motion to intervene was denied and was a final judgment as to the named parties, so that the later stipulation of dismissal had no bearing on the Association's right to appeal. **Charles Schwab & Co. Inc. v. McEntee, 666.**

**Jury request to review testimony—no objection at trial—plain error review**—Defendant's argument regarding the jury's request to review certain testimony was reviewable for plain error even though defendant did not object at trial. **State v. Hatfield, 765.**

**APPEAL AND ERROR—Continued**

**Motion for sanctions—frivolous appeal—denied**—The motion of three of the defendants for sanctions against other defendants under N.C. R. App. P. 34(a) for filing a frivolous appeal in a workers' compensation case was denied. Although the position of the appealing defendants was not strong and the underlying theme of the appeal was more equitable than legal in nature, the Court of Appeals denied the motion in its discretion. **Spivey v. Wright's Roofing, 106.**

**Motion to dismiss appeal—issue not moot**—The State's motion to dismiss defendant's appeal was denied where defendant's argument presented a legal question concerning the calculation of her prior record level and her previous stipulation to her prior convictions did not moot that issue. **State v. Gardner, 161.**

**Notice of appeal—timeliness—between rendition and 14 days from entry**—The State's appeal from the granting of a motion to dismiss misdemeanor driving while impaired was timely where the notice of appeal came between rendition of the judgment and the expiration of 14 days from entry of judgment. **State v. Wilson, 246.**

**Preservation of issues—failure to raise at trial**—Although plaintiffs wanted the Court of Appeals to address the issues in a medical malpractice case that the parties' agreement was unconscionable and that the agreement was inapplicable to Ms. O'Neal's loss of consortium claim, it declined because the trial court has not yet ruled on these questions and needed to make findings of fact. **King v. Bryant, 340.**

**Preservation of issues—inclusion of transcript in record on appeal**—Plaintiff's argument that the trial court abused its discretion in denying its request to include the hearing transcript in the record on appeal was not properly before the Court of Appeals and was dismissed. **Handy Sanitary Dist. v. Badin Shores Resort Owners Ass'n, 296.**

**Preservation of issues—issue not preserved**—Plaintiffs' argument that the trial court erred in a declaratory judgment action involving restrictive covenants by ruling on defendants' Rule 12(c) motion for judgment on the pleadings because defendants filed the motion simultaneously with their answer was not preserved for appellate review. **McCran v. Pinehurst, LLC, 368.**

**Preservation of issues—no objection at trial—custodial interrogation of juvenile—plain error review**—A juvenile's challenges to the admission of his statement to an officer were reviewed with a plain error standard where the juvenile did not assert his challenge in the court below. The North Carolina Supreme Court has flatly held that challenges to the admissibility of evidence based upon N.C.G.S. § 7B-2101 must be raised by means of a motion to suppress in order to preserve any challenge to the admission of such evidence for appellate review. **In re A.N.C., 315.**

**Preservation of issues—no prejudice**—Defendant failed to preserve for appellate review the argument that the trial court erred in a murder case by failing to instruct the jury on the potential interest of one of the witnesses who was testifying under the hope of a sentence reduction. Even assuming, *arguendo*, that defendant had properly preserved this argument, the evidence of defendant's guilt was overwhelming and defendant could not demonstrate prejudice. **State v. Mills, 773.**

**Right of appeal lost—defendant not at fault—certiorari granted**—The Court of Appeals exercised its discretion and granted certiorari in a criminal case where defendant lost her right of appeal through no fault of her own, but rather because of an error on the part of trial counsel. **State v. Gardner, 161.**

**APPEAL AND ERROR—Continued**

**Standard of review—holder of valid debt—de novo**—The determination that respondents were the holder of a valid debt required judgment and the application of law and was reviewed on appeal *de novo*. **In re Gray, 46.**

**State's appeal of dismissal in criminal action—jeopardy not attached**—The Court of Appeals had jurisdiction over the State's appeal from the dismissal of a first-degree murder prosecution where the dismissal occurred before trial, so that jeopardy had not attached. **State v. Dorman, 599.**

**Termination of parental rights—appeal properly taken**—Respondent mother properly and timely appealed from an order terminating her parental rights and therefore had the right to appeal the order changing the permanency planning order to adoption. Her notice of appeal correctly identified the orders from which appeal was taken, correctly identified the court to which appeal was taken, was properly signed by both respondent-mother and counsel, was properly served upon all parties, and was timely. **In re A.P.W., 534.**

**Termination of parental rights—permanency planning order change—implicit cessation of reunification**—Respondent mother had the right to appeal orders terminating her parental rights and changing the permanency planning order to adoption where DSS argued that the order did not contain a finding ceasing reunification efforts, as required by statute. The trial court's order implicitly ceased reunification efforts. **In re A.P.W., 534.**

**ARBITRATION AND MEDIATION**

**Arbitration agreement—unenforceable—failure in material terms**—The trial court did not err in a case involving an agreement to arbitrate by denying defendant's motion to dismiss and to compel arbitration. The agreement was unenforceable because it was impossible to perform due to a failure in its material terms. **Crossman v. Life Care Ctrs. of Am., 1.**

**Federal Arbitration Act—medical malpractice**—To the extent the parties entered into a valid agreement to arbitrate in a medical malpractice case, federal law and the provisions of the Federal Arbitration Act governed. **King v. Bryant, 340.**

**Indefiniteness—failure to agree on panel of arbitrators**—The trial court erred in a medical malpractice case by concluding that the parties' arbitration agreement was too indefinite to be enforced. The failure of the parties to agree on a panel of arbitrators did not render the agreement indefinite. **King v. Bryant, 340.**

**ARREST**

**Driving while impaired—probable cause**—The findings supported the trial court's conclusion that an officer had probable cause to arrest defendant for driving while impaired based on the circumstances in which defendant was found following an accident. **State v. Williams, 636.**

**Indecent exposure—jury instruction on resisting public officer—probable cause—apprehension required immediate arrest**—The trial court did not commit plain error by instructing the jury that an arrest for indecent exposure would be a lawful arrest for the jury charge on resisting a public officer. The officer had probable cause to believe that defendant would not be apprehended unless immediately

**ARREST—Continued**

arrested, and therefore, the arrest complied with N.C.G.S. § 15A-401(b). The fact that officers had already received defendant's license plate number and other identifying information was immaterial to this determination. **State v. Smith, 471.**

**ASSAULT**

**Appellate review—substantial evidence at trial—jury findings—irrelevant—**In an appeal from an assault prosecution arising from defendant's prolonged assault on his wife, including an assault with a bat, a jury finding that defendant was not guilty of attempted murder and the lack of a finding of intent to kill with respect to an assault with his fists were irrelevant. The inquiry focused only on whether there was substantial evidence of intent to kill presented at trial. **State v. Wilkes, 233.**

**Deadly weapon with intent to kill inflicting serious injury—intent to kill—sufficiency of evidence—**The trial court did not err by denying defendant's motions to dismiss the charge of assault with a deadly weapon with intent to kill inflicting serious injury because there was insufficient evidence to show intent to kill. Defendant's conviction was based on his use of a bat to assault his wife; both the nature and manner of the assault presented sufficient evidence for a jury to conclude that defendant had intent to kill. **State v. Wilkes, 233.**

**Deadly weapon with intent to kill—motion to dismiss—sufficiency of evidence—**The trial court did not err by denying defendant's motion to dismiss the charge of assault with a deadly weapon with intent to kill. When viewed in the light most favorable to the State, the evidence was sufficient to prove that defendant acted with the intent to kill when he fired a gun right beside the victim's head. **State v. Stokes, 483.**

**Habitual misdemeanor assault—jury instruction—physical injury—**The trial court did not commit plain error in a habitual misdemeanor assault case by failing to instruct the jury that it must find that the assaults resulted in a physical injury. In light of the uncontroverted evidence presented at trial showing that the victim suffered physical injuries as a result of the assaults, defendant could not show that absent the error, the jury probably would have returned different verdicts. **State v. Garrison, 170.**

**Two charges—not a single transaction—**Although defendant argued that the trial court erred by denying his motions to dismiss one of two felony assault charges since they constituted a single transaction, the State presented substantial evidence that there was a distinct interruption in the assaults in that the assaults involved a separate thought process, a time distinction, and injuries on different parts of the victim's body. The fact that both assaults were aimed at the head did not merge the offenses. **State v. Wilkes, 233.**

**BURGLARY AND UNLAWFUL BREAKING OR ENTERING**

**Felony breaking and entering—guilty plea—factual basis—sufficient statement—**The State presented a sufficient factual basis to support defendant's conviction of felony breaking and entering where the State's summary of the factual basis for the plea was sufficient to meet the requirements of N.C.G.S. § 15A-1022(c). **State v. Crawford, 426.**

**CHILD ABUSE, DEPENDENCY, AND NEGLECT**

**Adjudication and disposition order—lack of subject matter jurisdiction—**The trial court lacked subject matter jurisdiction in a juvenile neglect and dependency case to enter the 4 April 2012 adjudication and disposition order. The order lacked specific findings of fact and conclusions of law that the North Carolina court met the requirements of N.C.G.S. §§ 50A-201(a)(1) or 50A-201(a)(2) such that it could make a modification under N.C.G.S. § 50A-203. While the trial court had temporary jurisdiction to enter the continued non-secure child custody orders, the trial court did not have jurisdiction, exclusive or temporary, to enter the juvenile adjudication and disposition order. **In re E.J., 333.**

**Cessation of reunification efforts—sufficiency of findings of fact—**The trial court did not err in a child neglect case by ceasing reunification efforts and granting guardianship of a minor child to her grandparents even though respondent mother contended there were insufficient findings of fact to support the decision. Given the trial court's binding findings of fact and the supported portion of finding of fact eight, it could not be concluded that the unsupported portions of finding of fact eight were material to the trial court's decision to cease reunification efforts. **In re A.Y., 29.**

**Malicious castration—assault—sufficient evidence—**The trial court did not err by denying defendant's motion to dismiss the charges of attempted malicious castration, assault by strangulation, multiple counts of assault with a deadly weapon inflicting serious injury, and felonious child abuse because there sufficient evidence of each element of every crime charged and evidence that defendant was the perpetrator. **State v. Lanford, 189.**

**Neglect—facts supported by evidence—conclusion support by facts—**The trial court did not err in a child neglect case by concluding that the minor child was neglected. The findings of fact were supported by competent evidence, and the findings supported the conclusion of law that the child was neglected. **In re T.R.T., 567.**

**Visitation—via Skype—not sufficient—**The trial court erred in a child neglect case by ordering that respondent mother's sole visitation with the minor child take place via Skype. The trial court did not find that respondent-mother forfeited her right to visitation or that visitation was not in the minor child's best interest and communication via Skype is not visitation as contemplated by N.C.G.S. § 7B-905(c). **In re T.R.T., 567.**

**Waiver of future review hearings—reversed—**The Court of Appeals reversed the portion of the trial court's order waiving future review hearings in a child neglect case and remanded for the trial court to reconsider whether future review hearings are needed and to make appropriate findings of fact to support its decision. **In re A.Y., 29.**

**CHILD CUSTODY AND SUPPORT**

**Child support agreement—termination—**trial court did not err in a child support modification case by determining that the 7 June 2006 agreement had expired by its own terms and no longer contained any enforceable provisions. The execution of the 21 January 2010 agreement served to terminate the 7 June 2006 agreement. Further, defendant did not indicate how she was prejudiced by the alleged retroactive termination of the child support agreement. **Ludlam v. Miller, 350.**

**CHILD CUSTODY AND SUPPORT—Continued**

**Child support calculation—inheritance not factored in**—The trial court did not abuse its discretion in a child support modification case by deciding not to factor plaintiff's inheritance into its child support calculations. **Ludlam v. Miller, 350.**

**Child support modification—breach of support agreement—insufficient findings of fact**—The trial court erred in a child support modification case by failing to include any findings of fact and conclusions of law concerning alleged breaches of a 7 June 2006 child support agreement prior to 21 January 2010. The matter was remanded. **Ludlam v. Miller, 350.**

**Child support modification—child support worksheet—not attached to order—no prejudice**—The trial court did not commit prejudicial error in a child support modification case by failing to attach to the order a child support worksheet referenced in the order. Defendant included the relevant worksheet in the record and the Court's review of the order was not prejudiced. **Ludlam v. Miller, 350.**

**Child support modification—cost of insurance—self-support reserve category**—The trial court did not err in a child support modification case by ordering defendant to pay all of the health and dental insurance premiums for the children where the trial court did not err in determining that plaintiff fell within the self-support reserve category. **Ludlam v. Miller, 350.**

**Child support modification—cost of private school—not obligated**—The trial court did not err in a child support modification case by determining that plaintiff was not obligated to contribute to the costs of sending the children to private school as this determination was within the trial court's discretion. **Ludlam v. Miller, 350.**

**Child support modification—distribution of inheritance—insufficient findings of fact**—The trial court's order in a child support modification case was remanded for further findings of fact concerning the distribution of certain items of plaintiff's inheritance. **Ludlam v. Miller, 350.**

**Child support modification—documentation of insurance—insufficient findings of fact**—The trial court's order in a child support modification case was remanded for further findings of fact concerning what documentation was required for plaintiff to have access to the health and dental insurance provided by defendant for the children's benefit. **Ludlam v. Miller, 350.**

**Child support modification—sanctions—attorney fees—no abuse of discretion**—The trial court did not abuse its discretion in a child support modification case by failing to order sanctions against plaintiff, and by failing to award attorney's fees to defendant. The trial court gave the issues of attorney's fees and sanctions appropriate consideration, as reflected in its findings. **Ludlam v. Miller, 350.**

**Child support modification—self-support reserve category**—The trial court did not err in a child support modification case by finding that the matter fell into the self-support reserve category for child support. **Ludlam v. Miller, 350.**

**Cost of insurance—provided through stepparent—insufficient findings of fact**—The trial court erred in a child support modification case by assigning the cost of health and dental insurance to defendant without making specific findings of fact regarding the availability of reasonably priced health and dental insurance. Insurance provided through defendant's husband could be considered as reasonably priced insurance coverage available to defendant. The matter was remanded for further findings of fact. **Ludlam v. Miller, 350.**

**CHILD CUSTODY AND SUPPORT—Continued**

**Imputation of income—insufficient findings of fact**—The trial court failed to make sufficient findings of fact in a child support modification case to support its conclusion to impute minimum wage to both unemployed parties. The matter was remanded for further findings of fact to support its conclusions of law and rulings. **Ludlam v. Miller, 350.**

**Primary custody—best interests of child—insufficient findings of fact**—The trial court erred in a child custody case by failing to make sufficient findings of fact to support its conclusion that awarding primary custody of the minor child to defendant mother was in the minor child's best interest. The case was reversed and remanded to the trial court for additional findings of fact, as well as conclusions of law and decretal provisions based upon those findings. **Carpenter v. Carpenter, 269.**

**CIVIL PROCEDURE**

**Intervention—estate—adequate representation by personal representative**—In an interpleader action to determine the rightful beneficiary of an individual retirement account, the American Diabetes Association's motion for intervention as of right was properly denied. The Association failed to satisfy the third of the three requirements for intervention: that its interests were not adequately represented by the personal representative in the interpleader action. **Charles Schwab & Co. Inc. v. McEntee, 666.**

**Permissive intervention—denied**—There was no abuse of discretion in the denial of permissive intervention by the American Diabetes Association in an interpleader action to determine the rightful beneficiary of an individual retirement account. The trial court could properly conclude that the Association's interest in the interpleader action was adequately represented by the personal representative of the Estate. **Charles Schwab & Co. Inc. v. McEntee, 666.**

**Rule 59—denial of motion to amend—partial summary judgment order**—The trial court abused its discretion in an action seeking recovery of the balance due on a promissory note plus attorney fees, or in the alternative an order for specific performance, by denying defendant's N.C.G.S. § 1A-1, Rule 59 motion to amend a partial summary judgment order. N.C.G.S. §45-21.38 prohibited a monetary judgment in this instance. **Rutherford Plantation, LLC v. Challenge Golf Grp. of the Carolinas, LLC, 79.**

**CIVIL RIGHTS**

**Constitutionality of marriage statutes—defendants not 42 U.S.C. § 1983 people**—The trial court properly granted defendants' motion to dismiss a 42 U.S.C. § 1983 claim alleging that three North Carolina marriage statutes violated plaintiffs' constitutional rights. The Supreme Court of the United States has held that a State is not a person within the meaning of 42 U.S.C. § 1983. Likewise, Attorney General Cooper was not a person within the meaning of 42 U.S.C. § 1983 since he was not shown to have played a role in enforcing the statutes, thereby having engaged in an ongoing constitutional violation. Moreover, the trial court was not required, under these circumstances, to have allowed plaintiffs to join additional defendants. **Thigpen v. Cooper, 798.**



### COLLATERAL ESTOPPEL AND RES JUDICATA

**Res judicata—due process requirements—Medicaid fraud investigation—**The trial court committed reversible error in a Medicaid fraud investigation case by denying defendants' motion for summary judgment with respect to the legal theory of *res judicata* based on outcomes in the previous litigation between the parties in the federal district and state superior courts. Plaintiffs' desire to be heard in keeping with due process requirements was a material and relevant matter within the scope of the pleadings which in the exercise of reasonable diligence could and should have been brought forward in the prior litigation. **Housecalls Home Health Care, Inc. v. State, 306.**

### CONFESSIONS AND INCRIMINATING STATEMENTS

**Juvenile—custodial interrogation—**An officer did not subject a juvenile to custodial interrogation during the course of a roadside investigation into the accident in which the juvenile was involved and the officer's testimony that the juvenile acknowledged having driven the vehicle involved in the accident was not admitted in violation of N.C.G.S. § 7B-2101 or *Miranda*. The requirement that an individual involved in a motor vehicle accident remain on the scene does not equate to a restraint on that individual's freedom equivalent to "a formal arrest" and the juvenile did not establish that the officer's inquiry subjected him to even a minimal restraint on his freedom of movement or his ability to act as he chose. **In re A.N.C., 315.**

**Juvenile—statements following car wreck—**The voluntariness challenge to the admission of a juvenile's statement to an officer lacked merit where the thirteen-year-old was charged with offenses arising from having driven and wrecked a car and argued that the necessity created by N.C.G.S. § 20-166(c1) for him to respond to an officer's questions meant that his admission that he was the driver of the wrecked vehicle was made in violation of his constitutional right against compulsory self-incrimination. The mere requirement that an individual disclose his name to an investigating officer on the scene of a motor vehicle accident does not necessarily have incriminating effect and the record contains no additional information suggesting that his statement resulted from any coercive conduct on the part of the officer. **In re A.N.C., 315.**

### CONSTITUTIONAL LAW

**Compelled blood draw—no finding that statute unconstitutional—statutory criteria for dismissal not applicable—non-use of evidence stipulated—**A trial court order dismissing defendant's driving while impaired (DWI) charge for a compelled blood draw was reversed and remanded because none of the statutory criteria for dismissal applied. The trial court did not find that the misdemeanor DWI statute was unconstitutional as applied to defendant and the alleged constitutional violation did not irreparably prejudice the preparation of defendant's case. Given the State's stipulation that the blood evidence would not be offered against defendant, the trial court was required to summarily grant defendant's motion to suppress the blood evidence. **State v. Wilson, 246.**

**Criminal discovery—destruction of evidence—bad faith—pretrial determination—premature—**In an appeal by the State from the dismissal of a first-degree murder prosecution, the Court of Appeals held that the trial court was premature in concluding before trial that a bad faith constitutional violation (not preserving the bones used to identify the victim) caused such irreparable harm to defendant's



**CONSTITUTIONAL LAW—Continued**

case that dismissal was the only appropriate remedy. Defendant had not yet engaged an expert, had not attempted to test the bones that were preserved, and had not attempted to replicate the identification of the victim using radiographs of her teeth. **State v. Dorman, 599.**

**Criminal discovery—pretrial determination of violation**—The trial court erred by concluding that defendant's rights were flagrantly violated under *Brady v. Maryland*, 373 U.S. 83, by the State's failure to produce certain information before a pre-trial hearing. Defendant came into possession of the information with ample opportunity to make effective use of it. **State v. Dorman, 599.**

**Double jeopardy—driving while impaired—commercial driver's license revocation**—Defendant's prosecution for driving while impaired (DWI) subsequent to a commercial driver's license disqualification under N.C.G.S. § 20-17.4 constituted impermissible double jeopardy. Based on the factors in *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, N.C.G.S. § 20-17.4 is so punitive that it becomes a criminal punishment and defendant cannot subsequently face prosecution for DWI. **State v. McKenzie, 208.**

**Double jeopardy—possession or transportation of cocaine or heroin**—Defendant conceded that there was case law directly contrary to his position that punishing him for possession or transportation of cocaine and heroin violated the Double Jeopardy Clause. **State v. Johnson, 440.**

**Double jeopardy—prayer for judgment continued**—There was no double jeopardy violation for convictions of attempted first-degree murder and assault with a deadly weapon with intent to kill inflicting serious bodily injury where an unconditional prayer for judgment continued was entered on the latter conviction. **State v. Broom, 137.**

**Due process—destruction of evidence—potential rather than actual prejudice—bad faith required**—In an appeal by the State from the dismissal of a first-degree murder prosecution where the bones on which identification of the victim was based had been returned to the family and cremated, defendant could not meet his burden of demonstrating that the evidence was actually, as opposed to potentially, material and favorable to the defense. Defendant could only demonstrate a violation of due process under *Brady v. Maryland*, 373 U.S. 83, by the presence of bad faith by the State. **State v. Dorman, 599.**

**Due process—mootness—no available remedy**—Defendant's due process claim was moot because he had no available remedy. The subject of the claim was defendant's one-year commercial driver's license (CDL) disqualification under N.C.G.S. § 20-17.4, the disqualification had terminated, nothing in the record indicated that defendant was currently disqualified from holding a CDL, and defendant did not contend that collateral legal consequences were expected. **State v. McKenzie, 208.**

**Effective assistance of counsel—conflict of interest—new trial**—An armed robbery defendant received a new trial where his counsel had represented a state's witness in a prior unrelated matter and the record clearly reflected that defendant refused to waive the potential conflict of interest and requested new counsel. Neither the judge at a pretrial hearing nor the trial judge conducted any inquiry into the nature and extent of the potential conflict or whether defendant wished to knowingly, intelligently, and voluntarily waive the conflict. The showing of an actual conflict of interest that adversely affected defendant's representation was not required

**CONSTITUTIONAL LAW—Continued**

because defendant objected to continued representation by the trial counsel and requested new counsel. **State v. Gray, 431.**

**Effective assistance of counsel—no actual concession of guilt**—The trial court did not receive ineffective assistance of counsel through a concession of guilt where absolutely nothing in counsel's comment could be reasonably construed as suggesting that defendant would be found guilty, let alone a concession that he *should* be found guilty. **State v. Lovette, 456.**

**Effective assistance of counsel—probation revocation hearing—no different outcome**—Defendant received ineffective assistance of counsel in a probation revocation hearing where there was no reasonable probability that further evidence concerning defendant's education, lack of financial resources, or disability would have affected the outcome of defendant's probation violation hearing. **State v. Jones, 181.**

**Effective assistance of counsel—sentencing—prior federal felonies**—Defendant suffered no prejudice and no ineffective assistance of counsel where she contended that counsel was ineffective for failing to demonstrate that her prior federal convictions were substantially similar to North Carolina misdemeanors. The two offenses, N.C.G.S. § 14-225 and 18 U.S.C. § 1001, were not substantially similar. **State v. Crawford, 426.**

**Effective representation of counsel—admission of evidence**—An indecent liberties defendant was not entitled to relief on ineffective assistance of counsel grounds where he did not show deficient representation or prejudice from the admission of certain evidence. Defendant's ineffective representation claim regarding a detective's testimony on cross-examination was dismissed without prejudice to a future motion for appropriate relief because the record did not permit a proper evaluation of the evidence. **State v. Dew, 750.**

**Eighth amendment—discovery violation—pretrial detention**—the trial court's conclusion that there was an eighth amendment violation in a first-degree murder prosecution from the state's failure to disclose information was not supported by a precise legal or factual basis in its order dismissing the case. **State v. Dorman, 599.**

**Right to confrontation—juvenile witness testimony—closed-circuit television**—The trial court did not err in a child abuse case by granting the State's motion to allow the juvenile victim to testify outside defendant's presence via closed-circuit television (CCTV). Pursuant to *State v. Jackson*, 216 N.C. App. 238, 717 S.E.2d 35 (2011), the use of one-way CCTV to procure the victim's testimony did not inhibit defendant's ability to confront his accuser in violation of the Constitution, despite the lack of face-to-face confrontation, where the trial testimony was subjected to rigorous adversarial testing by defendant's attorney. Further, the trial court's findings of fact underlying its decision to permit use of CCTV were supported by the evidence. **State v. Lanford, 189.**

**Right to counsel—waiver—appointment of guardian ad litem in assistive capacity**—The trial court did not err in a child neglect case by allowing respondent mother to waive counsel and proceed pro se even though respondent contended the appointment of a guardian ad litem (GAL) precluded respondent from waiving counsel on her own behalf. Because the GAL was acting only in an assistive capacity, respondent had the ability to waive counsel, so long as that waiver was knowing and voluntary. **In re A.Y., 29.**

## CONTRACTS

**Breach—Athletics Scholarship Agreement—hypothetical and speculative injury—mootness**—Plaintiff former University of North Carolina football player did not raise any justiciable issues under the Athletics Scholarship Agreement (ASA) because: (1) he did not state facts making out a prima facie breach of the ASA as an express contract; (2) his alleged injury was too hypothetical and speculative to provide him with standing; and (3) his claims were moot. Plaintiff did not sustain any “injury in fact” because his scholarship was never terminated. Further, plaintiff accomplished the goal he sought to achieve, which was playing in the National Football League. Finally, the remedies plaintiff sought, both in compensation and declaratory judgment, were hypothetical in nature. **McAdoo v. Univ. of N.C. at Chapel Hill**, 50.

**Reciprocal wills—statute of frauds**—The trial court did not err in a case involving a purported contract between a husband and a wife to make and keep in force reciprocal wills by concluding it must satisfy the statute of frauds. Without evidence of such written contract, defendant was entitled to judgment as a matter of law. **State v. Mills**, 773.

**Specific performance—condition precedent**—The trial court did not err by entering an order directing plaintiff to perform all of its obligations under a Wastewater Services Agreement and a subsequent consent order. The trial court did not err in concluding that Article II was not a condition precedent to performance because the plain language of the Agreement and the consent order required immediate performance, inconsistent with the existence of a condition precedent. **Handy Sanitary Dist. v. Badin Shores Resort Owners Ass’n, Inc.**, 296.

## COSTS

**Negligent infliction of emotional distress—after summary judgment granted—not contrary to public policy**—The trial court’s order taxing costs against plaintiffs which were incurred after the trial court granted summary judgment in favor of defendants with respect to plaintiffs’ claims was not contrary to public policy encouraging settlements. Plaintiffs’ argument rested on the rights of a hypothetical set of parties who, after having settled, are taxed with costs incurred after the settlement of their claims, and the Court does not give advisory opinions. **Green v. Kearny**, 281.

**Negligent infliction of emotional distress—motion timely filed**—The trial court did not err in taxing costs against plaintiffs in a negligent infliction of emotional distress claim as defendants’ motion was filed within a reasonable time after the results of the litigation were known. **Green v. Kearny**, 281.

**Negligent infliction of emotional distress—summary judgment—plaintiffs still parties**—The trial court did not lack the authority to find plaintiffs Alston and Kelly liable for costs incurred after the trial court granted summary judgment in favor of defendants with respect to plaintiffs’ negligent infliction of emotional distress claims. As plaintiffs Alston and Kelly never requested the trial court to issue a final judgment as to them, under the plain language of Rule 54(b), they remained parties to the action and remained liable for costs incurred throughout the pendency of this case. **Green v. Kearny**, 281.

**Not taxed against guardian ad litem**—Plaintiffs’ argument that the trial court erroneously taxed costs against Mr. Green’s guardian ad litem was without merit as the trial court did not tax costs against the guardian ad litem. **Green v. Kearny**, 281.

## CRIMINAL LAW

**Burden of proof—evidence suppression hearing**—The trial court did not improperly place the burden of proof on defendant at his evidence suppression hearing where there was initially some confusion about whether the State or defendant had the burden of proof, defendant volunteered to proceed and called the two officers involved in the arrest to testify, and no other witnesses testified at the suppression hearing. The fact that defendant presented evidence first is not determinative of which party had the burden of proof. It was noted that the court's order should be in writing and should state the applicable burden of proof and whether it was met by the State. **State v. Williams, 636.**

**Denial of motion to dismiss—no written findings**—The trial court's failure to make written findings when denying defendant's motion to dismiss resulted in the remand of convictions for statutory rape and indecent liberties. While the trial court provided from the bench its rational for concluding that defendant's written statement was not rendered involuntary by injuries or painkillers, there was a material conflict in the evidence concerning a promise of leniency in exchange for the statement that the trial court did not address. **State v. Morgan, 784.**

**Discovery—dismissal as sanction—basis not specified**—The trial court abused its discretion by dismissing a first-degree murder prosecution with prejudice as a discovery sanction where the basis for determining that dismissal was appropriate could not be determined. The dismissal occurred before defendant pled guilty or proceeded to trial; moreover, defendant was given possession of the information before trial. **State v. Dorman, 599.**

**Discovery—no duty to create document—defendant in possession of information before trial**—Discovery sanctions short of dismissal in a first-degree murder prosecution were vacated because the State had no duty to create or continue to develop documentation regarding an investigation, and because defendant was in possession of the relevant information well before trial. **State v. Dorman, 599.**

**Discovery—withheld information—pretrial**—The trial court erred in its reliance on *Napue v. Illinois*, 360 U.S. 264, in dismissing a first-degree murder prosecution before trial for a discovery violation. *Napue* involved a conviction obtained by the knowing use of false evidence, while there had been no trial and no conviction in this case. **State v. Dorman, 599.**

**Jury request to review instructions—failure to exercise discretion—prejudicial**—The trial court's failure to exercise its discretion in response to a jury request to review testimony in a prosecution of an assault on defendant's wife was prejudicial. **State v. Hatfield, 765.**

**Jury request to review testimony—failure to exercise discretion**—The trial court erred in a prosecution arising from an assault on defendant's wife by failing to exercise its discretion as required by N.C. Gen. Stat. § 15A-1233(a) when the jury asked to review the testimony of the wife. Even if no written transcript was available, the trial court still had the discretion to allow the jury to rehear the testimony. **State v. Hatfield, 765.**

## DEEDS

**Judicial reformation—mutual mistake—clear, cogent, and convincing evidence**—The trial court did not err in a judicial reformation of a deed case by granting summary judgment in favor of defendants. Plaintiff failed to show a mutual

**DEEDS—Continued**

mistake of the parties by clear, cogent, and convincing evidence. **Inland Harbor Homeowners Ass'n, Inc. v. St. Josephs Marina, LLC, 721.**

**DIVORCE**

**Equitable distribution—classification—bank accounts—separate property—misapplication of burden of proof**—The trial court erred in an equitable distribution case by its classification of the two pertinent bank accounts. Because the record contained conflicting evidence regarding the classification of the property as marital versus separate, it could not be concluded that the trial court's misapplication of the burdens of proof was harmless. The trial court must on remand determine, with appropriate findings of fact and conclusions of law, whether defendant husband met his burden of proving that the accounts constituted separate property. **Finney v. Finney, 13.**

**Equitable distribution—unequal—sufficiency of findings of fact**—The trial court erred in an equitable distribution case by making an unequal distribution of the marital estate. The trial court must make new findings of fact addressing the value of property owned separately by plaintiff wife and identify the statutory basis for its findings regarding defendant husband's use of separate property to buy or fund marital assets. **Finney v. Finney, 13.**

**Equitable distribution—valuation—marital home**—The trial court did not err in an equitable distribution case by its valuation of the marital home. Defendant husband satisfied the requirement that he have both a knowledge of the property and some basis for his opinion, and therefore, his testimony provided competent evidence for the trial court's finding regarding the value of the marital home. **Finney v. Finney, 13.**

**DRUGS**

**No independent testing of marijuana—trooper's opinion sufficient**—Although defendant argued there was insufficient evidence to support his conviction for misdemeanor possession of marijuana because there was no independent testing of the green, leafy substance found in the cellophane wrapping, Trooper Hicks's testimony identifying the "green vegetable substance" introduced at trial as marijuana constituted substantial evidence that the substance in question was, in fact, marijuana. **State v. Johnson, 440.**

**Paraphernalia—scales—indicted for cellophane wrap**—Defendant's argument that there was insufficient evidence that scales found in his car were used as drug paraphernalia was irrelevant where the State indicted him for using a cellophane wrap found in his boxer shorts as a drug container, not for using the scales as drug paraphernalia. **State v. Johnson, 440.**

**Possession with intent to sell or deliver cocaine—motion to dismiss—sufficiency of evidence—constructive possession**—The trial court did not err by denying defendant's motion to dismiss the charge of possession with the intent to sell or deliver cocaine. There was sufficient evidence of incriminating factors to support constructive possession. **State v. Chisholm, 592.**

**Possession with intent to sell or deliver counterfeit controlled substance—motion to dismiss—sufficiency of evidence**—The trial court did not err by denying defendant's motion to dismiss the charge of possession with the intent to sell or

**DRUGS—Continued**

deliver a counterfeit controlled substance. The evidence was sufficient to establish one of three statutory factors defining a counterfeit controlled substance and to provide an inference of defendant's intent to sell or deliver. **State v. Chisholm, 592.**

**EMBEZZLEMENT**

**Evidence sufficient**—Assuming that an argument supporting a motion to dismiss that was not made at trial was properly preserved for appellate review, defendant's contention that the evidence admitted against her amounted to no more than assumption and speculation was not persuasive. The record revealed sufficient evidence to support the submission of the embezzlement charges to the jury. **State v. Warren, 791.**

**Owner of property—indictment and evidence**—The trial court did not err in an embezzlement case by failing to dismiss the charges where defendant alleged a fatal variance between the indictment and the evidence. Although the entity alleged as the victim in the indictment, Smoky Park Hospitality, was a management company and not the owner, as the manager Smoky Park Hospitality had a special property interest in the money embezzled from the business. **State v. Warren, 791.**

**Testimony of motel owner—defendant's duties**—The trial court did not err in an embezzlement prosecution against a motel manager by admitting testimony from the owner concerning defendant's duties. Although defendant argued that the owner had no first-hand knowledge of the tasks defendant performed, the owner's testimony that defendant generated the deposit summaries and put together the bank deposits was properly within the scope of his personal knowledge as contemplated by N.C.G.S. § 8C-1, Rule 602. **State v. Warren, 791.**

**EMPLOYER AND EMPLOYEE**

**Implementation of company safety policies—supervision—no reasonable foreseeability**—The trial court erred in a wrongful death case by granting summary judgment in favor of defendant Brinley. There was no evidence that Brinley's role in implementation of the company's safety policies was negligent since there was no showing that Brinley should have reasonably foreseen that more supervision was required to prevent defendant Dominguez' deliberate violation of company policy. **Taft v. Brinley's Grading Servs., Inc., 502.**

**Negligent hiring, supervision, and retention—compliance with company policy—wrongful death—no actual or constructive notice**—The trial court did not err in a wrongful death case by granting summary judgment on plaintiff's claim that defendant Brinley's Grading was independently negligent by failing to reasonably supervise defendant Dominguez to ensure that he complied with the company's vehicle policy, reasonably trained Dominguez regarding the policy, and secured the company vehicles' keys in a manner that would prevent unqualified employees from accessing them. There was no evidence that Brinley's Grading had actual or constructive notice of Dominguez' inherent unfitness regarding his duties or of prior negligence committed by Dominguez. **Taft v. Brinley's Grading Servs., Inc., 502.**

**EVIDENCE**

**Exclusion of evidence—offer of proof required on appeal**—No error was found in the exclusion of evidence by the trial court in an indecent liberties case where there was no offer of proof. **State v. Dew, 750.**

## EVIDENCE—Continued

**Hearsay—statements made by deceased—then existing mental condition—admissible**—The trial court did not err in a murder case by admitting alleged hearsay statements one of the deceased victims had made to her sister-in-law. The statements were admissible to show the victim's then existing mental, emotional, or physical condition pursuant to N.C.G.S. § 8C-1, Rule 803(3). Furthermore, defendant did not make any argument concerning how the alleged error prejudiced him. **State v. Mills, 773.**

**Juvenile's admission—corpus delicti rule**—Although a juvenile contended that the record did not contain sufficient evidence to support a determination that he operated a motor vehicle without being properly licensed on the basis of the *corpus delicti* rule, the record contained ample additional evidence tending to establish the trustworthiness of the juvenile's admission, thereby adequately supporting the trial court's denial of the juvenile's motion to dismiss. **In re A.N.C., 315.**

**Officer testimony—defendant a convicted sex offender—no abuse of discretion**—The trial court did not abuse its discretion in a resisting a public officer case by denying defendant's motion for a mistrial after an officer mentioned that defendant was a convicted sex offender in another county. Even assuming that defendant did not open the door to this testimony, the trial court promptly sustained defendant's objection, granted his motion to strike, and issued a curative instruction that properly addressed the inadmissible evidence without repeating it. **State v. Smith, 471.**

**Officer testimony—drugs—defendant's bedroom—sole control—similar evidence previously admitted**—The trial court did not err in a drugs case by admitting the testimony of an officer that the room in which the drugs were found was solely controlled by defendant. Where testimony had been previously admitted referring to a bedroom as defendant's bedroom, defendant could not show that he was prejudiced. **State v. Chisholm, 592.**

**Officer testimony—Newport cigarettes at defendant's house—relevancy—perpetrator of crime**—The trial court did not err in a possession of a firearm by a felon, second-degree kidnapping, assault with a deadly weapon with intent to kill, and robbery with a dangerous weapon case by allowing an officer to testify that he saw Newport cigarettes at defendant's house. The testimony was relevant because it tended to throw light upon whether defendant was the perpetrator of the crime. **State v. Stokes, 483.**

**Officer's opinion—scales of type used for drugs**—The trial court did not err in a prosecution for multiple drug offenses by admitting an officer's testimony that the scales found in defendant's car were of the type often used to measure drugs, especially marijuana. The State did not indict defendant on the theory that the scales were drug paraphernalia, but that a wrapping used to contain the cocaine, heroin, and marijuana found in his boxers was drug paraphernalia. **State v. Johnson, 440.**

**Testimony—character for truthfulness—opened door—failure to object**—The trial court did not err in a wrongful death case by permitting defendant to introduce the testimony of three witnesses who testified to defendant doctor's character for truthfulness. By calling into question the credibility of defendant, plaintiff opened the door for defendant to present the three witnesses. Although plaintiff further contended that the lay witnesses were not disclosed in defendant's discovery scheduling order, this issue was not preserved because plaintiff did not object at trial. **Manning v. Anagnost, 576.**



**EVIDENCE—Continued**

**Transcript of deposition—unavailable witness—interest of justice**—The trial court did not abuse its discretion in a wrongful death case by allowing defendant to present the transcript of a deposition of an unavailable witness at trial in the interest of justice. **Manning v. Anagnost, 576.**

**Victims' credibility—detective's statement—invited error**—There was no error in a prosecution for indecent liberties where a detective allegedly testified on cross-examination that the victims were "extremely credible." Defendant was not entitled to seek appellate relief on the grounds that the challenged testimony should have been excluded after directly posing a question that incorporated inadmissible material. **State v. Dew, 750.**

**Victims' credibility—statement by victims' mother—reaction when told of abuse**—There was no plain error in a prosecution for indecent liberties where the victims' mother repeated in court a statement that she believed her daughters. Taken in context, the statement was made in the course of a discussion of her emotional state when the victims told her that defendant had sexually abused them. Assuming that the admission of this portion of her testimony was improper, defendant did not show that the jury would have probably reached a different result absent the error. **State v. Dew, 750.**

**Victims' credibility—therapist's opinion**—The trial court did not err in an indecent liberties prosecution by allowing testimony from a family therapist in which, according to defendant, the therapist vouched for the victims' credibility. In context, the therapist never directly stated that the victims were believable, but described the actions and reactions of sexual abuse victims in general. **State v. Dew, 750.**

**Victims' credibility—victims' appearance and behavior—meeting with detective**—There was no plain error in a prosecution for indecent liberties where a detective allegedly vouched for a victim's credibility in his testimony. In context, the detective was simply describing the victim's appearance and behavior as she observed it during their meeting. **State v. Dew, 750.**

**FALSE PRETENSE**

**Obtaining property having value more than \$100,000—motion to dismiss erroneously denied—failure to show intent to deceive**—The trial court erred by denying defendant's motion to dismiss the charge of obtaining property having a value of more than \$100,000 by false pretenses. The State failed to offer sufficient evidence to establish that defendant made a false representation with the intent to deceive. **State v. Braswell, 734.**

**FIREARMS AND OTHER WEAPONS**

**Possession by felon—indictment**—An indictment charging defendant with possession of a firearm by a felon was fatally defective where it was not brought in a separate indictment. The form of the indictment is explicitly prescribed by statute; the intent of the legislature must be given effect. **State v. Wilkins, 492.**

**HIGHWAYS AND STREETS**

**Public road—change of grade—loss of access to right of way—no proof of negligence**—The trial court did not err by granting summary judgment in favor of



**HIGHWAYS AND STREETS—Continued**

defendant in an action seeking damages for plaintiffs' property caused by defendant's construction activities on a new road. There was no genuine issue of material fact regarding the public nature of the pertinent road. Any inconvenience suffered by plaintiffs as a result of the grading of the road authorized by the city was *damnum absque injuria* (loss without injury) and not compensable absent proof of negligence. **White v. NW Prop. Grp.-Hendersonville #1, LLC, 810.**

**HOMICIDE**

**Attempted first-degree murder—intent to kill—substantial evidence—**When viewed in the light most favorable to the State, there was substantial evidence from which the jury could conclude that defendant shot his wife (Danna) with the specific intent to kill and the trial court did not err in denying defendant's motion to dismiss the charge of attempted first-degree murder. The State presented evidence that defendant removed Danna's cell phone from her reach, left the room, returned with a .45 caliber pistol, and shot her in the abdomen with a hollow point bullet. Defendant then denied Danna medical assistance for approximately twelve hours. **State v. Broom, 137.**

**Death of child—mother shot while pregnant—child born alive—first-degree murder—**The trial court did not err by denying defendant's motion to dismiss the charge of first-degree murder where an infant died one month after her mother's shooting necessitated an early delivery. The precedent relied upon by defendant did not involve an infant born alive and, while the child was not directly injured by the shooting, there was expert medical testimony that the early delivery was required by the shooting and was a cause of the child's necrotizing enterocolitis, the direct cause of death. **State v. Broom, 137.**

**First-degree murder—request for instruction on second-degree murder—**premeditation and deliberation not negated—The trial court did not err by denying defendant's request for an instruction on second-degree murder where defendant did not provide evidence negating premeditation and deliberation other than his denial that he committed the offense. **State v. Broom, 137.**

**Premeditation and deliberation—shooting of pregnant woman—child born alive—**The trial court did not err by denying defendant's motion to dismiss the charge of first-degree murder where defendant challenged the evidence of premeditation and deliberation. Defendant's shooting of his pregnant wife led to the early delivery of the victim, who died after one month of life from complications of the early delivery. Defendant's statements and actions were sufficient to allow reasonable minds to conclude that he acted with premeditation and deliberation when he shot his wife. **State v. Broom, 137.**

**IDENTIFICATION OF DEFENDANTS**

**Motion for mistrial—smaller photograph of defendant—not impermissibly suggestive—due process—**The trial court did not err in a larceny after breaking or entering case by denying defendant's motion for a mistrial. There was no case supporting the proposition that admission of an identification based on a smaller photograph was an error resulting in substantial and irreparable prejudice requiring mistrial. The size discrepancy was not impermissibly suggestive. Because the procedure was not impermissibly suggestive, the due process analysis ended. **State v. Wilson, 498.**

## IMMUNITY

**Sovereign immunity—motion to dismiss—redress for constitutional injury—diverting fees from public school funds into general revenue fund**—The trial court did not err in a declaratory judgment case regarding a newly enacted fee under N.C.G.S. § 7A-304(4b) by denying defendants' motion to dismiss the case upon grounds of sovereign immunity. The newly enacted fee collected a penalty in Richmond County and diverted that penalty from Richmond County's public school funds into the general revenue fund of the State. The law in this state does not permit the State to assert sovereign immunity to preclude a plaintiff from seeking redress for an alleged constitutional injury under Article IX, Section 7 of our Constitution. **Richmond Cnty. Bd. of Educ. v. Cowell, 583.**

## INDICTMENT AND INFORMATION

**Statutory rape—carnal knowledge—common understanding**—An indictment for statutory rape that alleged that defendant did "carnally know" the victim alleged all material elements of the crime charged, even though the statute referred to "vaginal intercourse." At common law "carnal knowledge" and "sexual intercourse" are synonymous and a person of common understanding would know that the indictment alleged an act of vaginal intercourse. **State v Morgan, 784.**

**Variance with evidence—name of motel from which money embezzled—variance not material**—A variance between the name "Comfort Inn" and "Comfort Inn West" in the indictment and the evidence in an embezzlement prosecution was not material and not fatal. There was no evidence of confusion or controversy as to which Comfort Inn defendant was charged with embezzling from. **State v. Warren, 791.**

## JUDGMENTS

**Motion to enforce foreign judgment—Rule 60—Full Faith and Credit Clause—grounds for postjudgment relief**—The trial court erred by denying defendant's motion to enforce an Alabama judgment pursuant to the Uniform Enforcement of Foreign Judgments Act under N.C.G.S. §§ 1C-1701 to -1708 based on the grounds of intrinsic fraud, misrepresentation and misconduct. In North Carolina, the remedies available under N.C.G.S. § 1A-1, Rule 60 are limited by the Full Faith and Credit Clause of the United States Constitution for a foreign judgment. Postjudgment relief from foreign judgments under Rule 60(b) is limited to the following grounds: (1) the judgment is based upon extrinsic fraud; (2) the judgment is void; or (3) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application. **DocRx, Inc. v. EMI Servs. of N.C., LLC, 7.**

## JURISDICTION

**Declaratory judgment—restrictive covenants**—Plaintiffs' argument that the trial court erred in a declaratory judgment action involving restrictive covenants by granting defendants' Rule 12(c) motion and defendant Pinehurst, LLC's Rule 12(b) (6) motion was dismissed. Plaintiffs did not have standing to maintain the underlying action because plaintiffs were not parties to the deeds creating the restrictive covenants at issue, and there was no evidence of intent by the covenanting parties to benefit plaintiffs. **McCraun v. Pinehurst, LLC, 368.**

**JURISDICTION—Continued**

**Subject matter—negligent infliction of emotional distress—Workers’ Compensation Act—exclusivity provisions—**The trial court lacked subject matter jurisdiction over plaintiff’s negligent infliction of emotional distress claim caused by defendant’s willful or wanton negligence because the exclusivity provision of the Workers’ Compensation Act gives the Industrial Commission exclusive jurisdiction over this type of claim. Plaintiff’s claim fell within the purview of the Worker’s Compensation Act but was not enough to sustain a *Woodson* claim and thereby qualify as an exception to the exclusivity provisions of the Workers’ Compensation Act. **Shaw v. Goodyear Tire & Rubber Co., 90.**

**JURY**

**Deliberations—request for surveillance video—specific consent of parties not reached—**The trial court did not err in a negligence case arising out of a slip and fall accident by not submitting a surveillance video to the jury in the jury room during deliberations. The parties never reached the requisite level of specific consent with respect to the questions of whether and how the jury would view the surveillance videotapes. **Redd v. WilcoHess, LLC, 726.**

**Requested preselection instruction—denied—proper instruction given—**There was no abuse of discretion in the trial court’s denial of defendant’s request for a preselection jury instruction regarding the killing of an unborn child in a first-degree murder prosecution arising from the shooting of the child’s mother. Defendant failed to include the requested instruction in the record; moreover, the trial court properly instructed the jury. **State v. Broom, 137.**

**Selection—hearing impaired prospective juror—**The trial court did not abuse its discretion in a prosecution for murder, kidnapping, and robbery by denying defendant’s request to excuse a prospective juror for cause based on his hearing where the court obtained a hearing device for the juror, tested the device in the courtroom, and the court gave a logical and thoughtful explanation of its ruling. **State v. Lovette, 456.**

**Selection—prima facie case of discrimination—Batson hearing—**The trial court did not err in a murder case by failing to conduct a Batson hearing where defendant failed to establish a *prima facie* case of discrimination. **State v. Mills, 773.**

**Selection—questioning limited—no abuse of discretion or prejudice—**There was no abuse of discretion or prejudice in a prosecution arising from the shooting of defendant’s pregnant wife and the early delivery and subsequent death of the baby where the trial court limited defendant’s voir dire questioning about when life begins and the death of a baby. The trial court sustained the State’s objection to questioning that was confusing and not relevant. **State v. Broom, 137.**

**Selection—questions regarding interested witnesses—witnesses with criminal backgrounds—**There was no abuse of discretion in a prosecution for murder, kidnapping, and robbery where the trial court overruled defendant’s objections to questions asked of prospective jurors about testimony from witnesses with criminal backgrounds or about their feelings regarding felony murder. These were attempts to determine the prospective jurors’ abilities to follow the law and not reject out of hand the testimony of interested witnesses or those with criminal records, not hypothetical questions intended to stake out the jurors. **State v. Lovette, 456.**

## JUVENILES

**Delinquency—oral admissions—custodial interrogation—Miranda warnings**—The trial court did not err by denying the juvenile defendant's motion to suppress his oral admissions to investigating officers. The juvenile was not in custody at the time that he orally admitted having fired a shot which struck the neighbor's residence, and thus, was not subjected to an impermissible custodial interrogation conducted without the provision of the warnings required by *Miranda*, 384 U.S. 436, and N.C.G.S. § 7B-2101. **In re D.A.C., 547.**

**Delinquency—reckless driving**—The trial court erred by denying a juvenile's motion to dismiss the petition alleging that he be adjudicated delinquent for reckless driving. The mere fact that an unlicensed driver ran off the road and collided with a utility pole did not suffice to establish a violation of N.C.G.S. § 20-140(b). **In re A.N.C., 315.**

**Delinquency—unauthorized use of motor vehicle**—The trial court erred by denying a juvenile's motion to dismiss a petition that he be adjudicated delinquent for committing the offense of unauthorized use of a motor vehicle. The mere fact that an underaged, unlicensed individual operated a motor vehicle registered to another person did not, without more, suffice to establish the required lack of consent. **In re A.N.C., 315.**

## KIDNAPPING

**Second-degree—motion to dismiss—sufficiency of evidence**—The trial court erred by denying defendant's motion to dismiss the charge of second-degree kidnapping. The State failed to offer sufficient evidence to prove removal. Further, neither party contended that the victim was ever confined or restrained. The case was remanded for a new sentencing hearing. **State v. Stokes, 483.**

## LARCENY

**After breaking or entering—findings of fact—conclusions of law—immediately after conclusion of suppression hearing—not required**—The trial court did not err in a larceny after breaking or entering case by failing to make findings of fact and conclusions on the record immediately at the conclusion of the suppression hearing. The trial court complied with N.C.G.S. § 15A-977(f) and did not err by entering its written order. **State v. Wilson, 498.**

## LIENS

**Claim of lien—contract—making of an improvement to land**—The trial court did not err by granting summary judgment in favor of Plaintiff on a claim of lien as the work performed by Plaintiff under its contract with defendant Richmond Hill involved the making of an improvement to land. **Ramey Kemp & Assocs., Inc. v. Richmond Hills Residential Partners, LLC, 397.**

**Filing claim of lien—last furnished labor or materials—no genuine issue of material fact**—The trial court did not erroneously grant summary judgment in favor of Plaintiff on its claim of lien. Plaintiff offered evidence that it had filed its claim of lien well within the statutorily specified 120 days of the date upon which it last furnished labor or materials under the relevant contract and Defendants failed to adduce admissible evidence demonstrating the existence of a genuine issue of material fact concerning the date upon which Plaintiff last provided services. **Ramey Kemp & Assocs., Inc. v. Richmond Hills Residential Partners, 397.**

**MORTGAGES AND DEEDS OF TRUSTS**

**Deed of trust—valid, enforceable, and superior lien—summary judgment improper**—The trial court erred in a deed of trust case by entering summary judgment in favor of defendant Federal National Mortgage Association (FNMA). The trial court improperly relied on N.C.G.S. § 45-37(b) to conclude that the Charlotte Falk Irrevocable Trust's (Trust) lien on the property at issue had expired and the Trust's lien remained valid, enforceable, and superior to FNMA's lien. **Falk v. Fannie Mae, 685.**

**Foreclosure—determination of valid debt**—The trial court did not err by concluding that a valid debt existed in a foreclosure action where petitioners argued that respondents were required to show evidence that the underlying loan transaction was not accomplished in violation of any statute. The precedent relied upon by petitioners was distinguishable on its facts, petitioners merely argued conclusions without stating any specific factual allegations, no support for petitioner's contention was found in their precedent, and equitable defenses to the foreclosure should be asserted in an action to enjoin the foreclosure sale. **In re Gray, 46.**

**Foreclosure—valid and superior lien—not extinguished by foreclosure—right to foreclose under deed**—The trial court erred in a foreclosure action by reversing an order allowing plaintiff Charlotte Falk Irrevocable Trust (Trust) to proceed with foreclosure on the property at issue. The Trust's lien on the property was valid and superior to defendant Federal National Mortgage Association's (FNMA) lien. Therefore, the Trust's lien was not extinguished by the foreclosure of the FNMA Deed and the Trust had the right under the deed of trust to foreclose on the property. **Falk v. Fannie Mae, 685.**

**PARTIES**

**Proper party—juvenile neglect and dependency—parent**—Although respondent mother was not served with the juvenile petition in a neglect and dependency case, she was a proper party to appeal the adjudication and disposition order under N.C.G.S. § 7B-1002. **In re E.J., 333.**

**PENALTIES, FINES, AND FORFEITURES**

**Civil penalties—non-conforming outdoor advertising sign**—Based on the erroneous conclusion that petitioner Fairway Outdoor Advertising timely appealed the issue of its outdoor advertising sign's compliance with the town's land development ordinance, the zoning case was remanded for the trial court to reconsider the issue of civil penalties. **Fairway Outdoor Adver. v. Town of Cary, 676.**

**PLEADINGS**

**Answer—allegations denied in answer—refuted at trial—complete medical records not available when answer filed—good faith**—The trial court did not abuse its discretion in a wrongful death case by allowing defendant doctor to refute allegations contained in plaintiff's complaint at trial that he had denied in his answer on the basis of lack of knowledge and information. Defendant had denied certain allegations contained in plaintiff's complaint in good faith since it was expressly based on the fact that the complete medical records were not available for review at the time the answer was filed. **Manning v. Anagnost, 576.**

**POLICE OFFICERS**

**Resisting public officer—probable cause—fleeing scene of crime—indecent exposure—willfulness**—The trial court did not err by denying defendant's motion to dismiss the charge of resisting a public officer based on alleged insufficient evidence that defendant's arrest was lawful and that defendant willfully resisted. Because the officer had probable cause to believe that defendant was fleeing the scene of the crime and the officers had probable cause to believe that he had committed indecent exposure, his warrantless arrest was lawful. A reasonable juror could conclude that defendant's subsequent attempts to pull his pants up did not constitute justification for refusing to obey the officer's commands to submit peacefully to the arrest. **State v. Smith, 471.**

**PREMISES LIABILITY**

**Logging site—debris and logs—no clear path across site**—The trial court improperly granted defendant Evans Logging's N.C.G.S. § 1A-1, Rule 12(b)(6) motion to dismiss a negligence claim arising from an accident at a logging site. Plaintiffs' complaint clearly stated that the condition of the logging site consisted of scattered logs and debris strewn about the entire logging site, with no path free of logs and debris for crossing the site. Whether plaintiff Walter Overton should have recognized the danger and acted in a different manner was a question for the jury. **Overton v. Evans Logging, Inc., 74.**

**Negligence—last clear chance—jury instruction—insufficient evidence**—The trial court did not commit reversible error in a negligence case arising out of a slip and fall accident by denying plaintiff's request for a jury instruction on last clear chance. The evidence presented at trial was not sufficient to support a reasonable inference by the jury that defendants' employee had the time and ability to avoid the injury, the third element of the claim. **Redd v. WilcoHess, LLC, 726.**

**Negligence—willful and wanton negligence—jury instruction—insufficient evidence**—The trial court did not commit reversible error in a negligence case arising out of a slip and fall accident by denying plaintiff's request for a jury instruction on willful and wanton negligence. The evidence presented at trial was not sufficient to support a reasonable inference by the jury that defendants' employee acted with any purpose or deliberation not to discharge his duty to plaintiff's safety or acted with a wicked purpose or manifested a reckless indifference to plaintiff's safety. **Redd v. WilcoHess, LLC, 726.**

**PRETRIAL PROCEEDINGS**

**Summary judgment motion—consideration of affidavits—prejudicial error**—The trial court erred in a case concerning the purchase of a tract of real property by failing to consider plaintiffs' evidence during a hearing on defendants' motion for summary judgment. The court's error was prejudicial as the depositions contained a sufficient forecast of evidence to establish the existence of a genuine issue of material fact concerning the individual liability of defendants. **Timber Integrated Investments LLC v. Welch, 641.**

**PROBATION AND PAROLE**

**Probation revocation—willful violation—remand—clerical error**—The trial court did not abuse its discretion by revoking defendant's probation where defendant was convicted of a criminal offense while on probation, and defendant admitted

**PROBATION AND PAROLE—Continued**

to the willfulness of the violation. The matter was remanded to the trial court to fix a clerical error. **State v. Jones, 181.**

**Revocation—insufficient evidence of violation**—The trial court erred by revoking defendant's probation and activating his jail sentence for failing to complete any of his community service, being \$700 in arrears of his original balance, and being \$150 in arrears of his supervision fee. The State failed to present evidence of a payment plan and schedule for community service or any evidence that defendant had not paid his required fines or performed his required community service at the time of the revocation hearing. **State v. Boone, 423.**

**RAPE**

**Statutory—second-degree rape—lesser-included offense—separate punishments prohibited—failure to object—ineffective assistance of counsel**—The trial court erred by denying defendant's motion for appropriate relief based on ineffective assistance of counsel. Under the reasoning of *State v. Ridgeway*, 185 N.C. App. 423, separate punishments for statutory rape and second-degree rape, a lesser-included offense of first-degree rape, are prohibited by legislative intent. Because defense counsel failed to object to defendant's judgment which sentenced him for both statutory rape and second-degree rape convictions based upon a single act of sexual intercourse, defendant received ineffective assistance of counsel. **State v. Banks, 417.**

**Statutory—indictment—language**—An indictment for statutory rape was sufficient where it alleged all of the material elements of N.C.G.S. § 14-27.7A. The indictment was not insufficient because it did not contain the language "by force and against her will"; N.C.G.S. § 15-144.1 does not apply to the statutory rape of a child 13, 14, or 15 years old. **State v. Morgan, 784.**

**ROBBERY**

**Armed—indictment—person from whom property taken—not named**—An indictment for armed robbery that did not name the person from whom the property was taken was sufficient to convey subject matter jurisdiction. By alleging that defendant took and carried away "another's personal property," this indictment negated the idea that defendant was taking his own property. Moreover, the indictment named the person whose life was endangered by the threatened use of firearms. **State v. Lovette, 456.**

**SATELLITE-BASED MONITORING**

**Highest possible level of supervision—low risk for offending—additional findings not supported**—The trial court erred in a satellite-based monitoring case by determining that defendant required the highest possible level of supervision and monitoring upon his release from prison for a sexual offense. The STATIC-99 risk assessment classified him as a low risk for reoffending and the trial court's additional findings were not supported by the evidence. **State v. Thomas, 631.**

**Indecent liberties—offense against a minor—sexually violent offense**—The trial court erred in a satellite-based monitoring (SBM) case by concluding that defendant had committed an "offense against a minor" as defined by statute, thus subjecting him to SBM. Taking indecent liberties is not an offense against a minor;

**SATELLITE-BASED MONITORING—Continued**

however, it is a sexually violent offense under N.C.G.S. § 14-208.6(5), and is therefore grounds for imposition of SBM, assuming all other requirements are met. **State v. Thomas, 631.**

**SEARCH AND SEIZURE**

**Inevitable discovery—no evidence**—The trial court erred by denying defendant's motion to suppress evidence seized from his laptop computer. Defendant's statement regarding the location of his computer was suppressed because it resulted from a promise, hope, or reward and there was no competent evidence to support the trial court's finding that his laptop computer would have inevitably been discovered. **State v. Wells, 487.**

**Probable cause—roadside search**—The trial court correctly concluded in a prosecution for multiple drug offenses, including trafficking, that officers had probable cause to search defendant where defendant smelled of marijuana, the troopers had discovered in defendant's car a scale of the type used to measure drugs, a drug dog had alerted in defendant's car, and the troopers had noticed a blunt object in the inseam of defendant's pants during a pat down. **State v. Johnson, 440.**

**Roadside search inside clothes—steps to protect privacy**—Officers doing a roadside search of defendant by pulling his pants away from his body took reasonable steps to protect defendant's privacy where the only private areas subjected to search by the troopers remained covered by defendant's compression shorts and they did not remove his pants or outer underwear to retrieve the package of drugs from his pants. **State v. Johnson, 440.**

**Roadside search inside clothes—sufficient basis**—In a prosecution involving drug trafficking, there was sufficient information to provide a basis for believing that contraband was present beneath defendant's underwear. Even assuming that what followed was a strip search, *State v. Battle*, 202 N.C. App. 376, did not apply and the trial court did not err by denying defendant's motion to suppress. **State v. Johnson, 440.**

**SENTENCING**

**Habitual felon—jury instructions—sufficient evidence**—The trial court did not commit plain error in its jury instructions regarding a habitual felon charge as there was sufficient evidence to support the instructions. **State v. Hoskins, 177.**

**Habitual felon—stipulation to prior felonies**—Defendant's habitual felon conviction was vacated where defendant stipulated at his sentencing hearing to the three predicate felonies alleged by the State but the issue was not presented to the jury, nor did the trial court establish a record of a guilty plea. **State v. Wilkins, 492.**

**Habitual felon—three prior felonies—sufficient evidence**—The trial court did not err by denying defendant's motion to dismiss a habitual felon charge. The State introduced evidence of defendant's convictions on two felonies during the habitual felon phase and evidence of a third felony, a first-degree sexual offense conviction, during the trial for failing to register as a sex offender, the principal offense. There is no need to reintroduce evidence presented during the trial for the principal offense at the habitual felon hearing. **State v. Hoskins, 177.**



## SENTENCING—Continued

**Life imprisonment for juvenile—remanded—new statute**—A sentence of life imprisonment without parole for a defendant who was 17 years old when the crime was committed was remanded for a new sentencing hearing where defendant's direct appeal was pending when N.C.G.S. § 15A-1476 was enacted to comply with a U.S. Supreme Court decision. **State v. Lovette, 456.**

**Mitigating factor—evidence of employment history**—The sentencing judge erred by failing to find as a mitigating factor that defendant had a positive employment history where uncontradicted and manifestly credible evidence of defendant's positive employment history was introduced. **State v. Wilkes, 233.**

**New sentence more severe at resentencing—statutorily mandated sentence**—The Court of Appeals granted defendant's petition for a writ of *certiorari* and determined that defendant was not entitled to a new sentencing hearing even though the trial court imposed a new sentence at the resentencing hearing that was more severe than the prior vacated sentence. The trial court did not violate N.C.G.S. § 15A-1335 since the trial court imposed a statutorily mandated sentence which it improperly failed to do the first time. **State v. Cook, 745.**

**Prior New York drug convictions—substantially similar to North Carolina Class G felonies**—The trial court did not err in a felonious breaking and entering, felonious larceny after breaking and entering, and felony possession of burglary tools case by determining that two of defendant's prior New York drug convictions were substantially similar to North Carolina Class G felonies. The relevant New York and North Carolina drug schedules substantially overlapped. **State v. Claxton, 150.**

**Prior record level—additional point—elements of offense**—The trial court erred by including an additional point to calculate defendant's prior record level where all of the elements of the consolidated assault with a deadly weapon on a government officer offense were not included in any of defendant's then-prior offenses. **State v. Gardner, 161.**

**Prior record level—calculation—New York records—preponderance of evidence**—The trial court did not err in a felonious breaking and entering, felonious larceny after breaking and entering, and felony possession of burglary tools case by using the New York Department of Criminal Investigation records to calculate defendant's prior record level even though defendant alleged there were inconsistencies. Since the State was only required to prove defendant's prior convictions by a preponderance of evidence, the State met its burden. **State v. Claxton, 150.**

**Prior record level—out-of-state crimes—comparison of punishments not sufficient**—The trial court erred when sentencing defendant for armed robbery by finding that defendant's convictions in Tennessee were substantially similar to certain North Carolina offenses and assigning prior record level points accordingly. At no point in its evaluation of defendant's Tennessee convictions did the trial court compare the elements of the allegedly similar North Carolina offenses against the elements of the Tennessee offenses. A review of the punishments associated with a crime is not the same as a comparison of its elements and does not meet the substantial similarity test. **State v. Sanders, 227.**

**Prior record level points—calculation—harmless error**—The Court of Appeals did not need to address any of defendant's arguments regarding additional prior record level points, as any error on the part of the State or the trial court in calculating any of defendant's additional points would not change his record level and was thus harmless. **State v. Cook, 745.**

**SENTENCING—Continued**

**Prior record points—federal felony convictions**—The trial court did not err by finding that defendant had four prior record points and sentencing her at a prior record level II where defendant made no showing before the trial court that either of her two prior federal felony convictions were substantially similar to North Carolina misdemeanors. **State v. Crawford, 426.**

**SEXUAL OFFENDERS**

**Request to terminate sex offender registration—jurisdiction—must be filed in district where convicted**—Petitioner's appeal from the denial of his petition for termination of his sex offender registration was dismissed. The superior court did not have jurisdiction to decide the petition because defendant was required to file his petition in the district where he was convicted of the offense. **In re Dunn, 43.**

**STATUTES OF LIMITATION AND REPOSE**

**Professional negligence—claim barred**—Plaintiffs' legal malpractice claim was barred by the statute of repose where plaintiffs commenced their action more than four years after the last act of defendants giving rise to plaintiff's cause of action. **Carle v. Wyrick, Yates & Ponton, LLP, 656.**

**Tolling—voluntary dismissal—new causes of action**—The trial court properly dismissed claims for breach of contract and conversion asserted against defendant Ruff and a conversion claim asserted against defendant First Citizens as barred by the statute of limitations where those claims appeared for the first time in a second complaint. The N.C.G.S. § 1A-1, Rule 41(a) tolling of the applicable statute of limitations applied only to the claims in the original complaint, and not to other causes of action that may have arisen out of the same set of operative facts. **Williams v. Lynch, 522.**

**Voluntary dismissal and refiling—negligence refiled as professional malpractice—relation back**—The trial court erred in granting defendant Ruff's motion to dismiss a professional malpractice claim on statute of limitations grounds where there had been a voluntary dismissal of a first complaint. The professional malpractice claim in the second complaint related back under N.C.G.S. § 1A-1, Rule 41(a)(1) to the filing of the negligence claim in the first complaint. **Williams v. Lynch, 522.**

**TAXATION**

**Ad valorem property tax—arbitrary and capricious decision**—The North Carolina Property Tax Commission erred by upholding Davidson County's 2007 *ad valorem* property tax valuation of two textile mills. The Commission's decision remained arbitrary and capricious and did not contain a reasoned analysis. The case was again remanded to the Commission for further findings of fact and conclusions of law. **In re Appeal of Parkdale Mills, 713.**

**TERMINATION OF PARENTAL RIGHTS**

**Authority to file petition—guardianship—permanent planning review**—The trial court did not err in a termination of parental rights case by concluding petitioners had authority to file a petition to terminate respondents' parental rights after the trial court ordered guardianship as the permanent plan. The guardians' petition seeking to terminate respondent's parental rights was proper, and respondents

**TERMINATION OF PARENTAL RIGHTS—Continued**

contention that another permanency planning review hearing should have been held prior to the filing of the termination petition had no merit. **In re D.C., 327.**

**Cessation of reunification efforts—sufficiency of findings of fact—domestic violence**—The trial court did not abuse its discretion in a termination of parental rights case by ceasing reunification efforts and initiating termination of parental rights proceedings. There were extensive findings regarding respondent father's history of domestic violence, the impact of that violence on the minor children, and his lack of appreciation of the effect of such violence, even after attending the available programs. **In re T.J.C., 556.**

**Denial of motion for review—misapprehension preventing court from exercising discretion**—The trial court abused its discretion by denying respondent mother's motion for review based on the court's mistaken belief that it had entered an order terminating parental rights at the conclusion of the termination hearing. The court's denial of the motion to re-open the evidence was based on a misapprehension that prevented the court from properly exercising its discretion. **In re B.S.O., 541.**

**Findings for ceasing reunification efforts—required**—The trial court erred when changing a permanency planning order to adoption and terminating parental rights by not making the statutorily required findings for ceasing reunification efforts between respondent and her children. Although the order detailed respondent-mother's case history and her failure to complete her case plan, it did not contain any of the findings required by N.C.G.S. § 7B-507(b) and was remanded. **In re A.P.W., 534.**

**Grounds—failure to make reasonable progress—sufficiency of findings of fact**—The trial court did not err in a termination of parental rights case by concluding that respondent mother's failure to make reasonable progress was supported by the findings of fact. Because the trial court did not err in terminating respondent's parental rights on at least one ground for termination pursuant to N.C.G.S. § 7B-1111, the Court of Appeals did not need to address respondent's arguments regarding the grounds of neglect or willful abandonment. **In re D.C., 327.**

**Grounds—neglect**—The trial court did not err by terminating respondents' parental rights to their three minor children. The findings of fact supported the conclusion of law that the parental rights of both respondents may be terminated on the ground of neglect. **In re T.J.C., 556.**

**UNFAIR TRADE PRACTICES**

**Waivers of restrictive covenants—not fictitious or deceptive**—The trial court did not err in an unfair and deceptive acts or practices case by granting defendant Pinehurst, LLC's Rule 12(b)(6) motion to dismiss. Plaintiffs' contention that the waivers of restrictive covenants signed by defendant Pinehurst, LLC were fictitious and deceptive was without merit. **McCraun v. Pinehurst, LLC, 368.**

**UTILITIES**

**Sale of water system—allocation of gain—Commission policy—not arbitrary and capricious**—Although appellants argued that a Utilities Commission's order should be overturned as arbitrary and capricious because the Commission's policy concerning allocation of the gain from the sale of water systems and its exception

**UTILITIES—Continued**

were poorly defined, the validity of the policy was addressed in prior cases and found not to be arbitrary and capricious. **State of N.C. ex rel. Utils. Comm'n v. Carolina Water Serv., Inc. of N.C., 120.**

**Sale of water system—allocation of gain—Commission's authority—**The Utilities Commission did not exceed its statutory authority by allocating a portion of the gain on sale of a water utility to ratepayers and thus committed no error of law in an action arising from the City of Charlotte's annexation of property and the purchase of an existing water system. Contrary to the argument of the purchased utility, the Commission's authority exists under chapter 62 of the North Carolina General Statutes, not "general ratemaking principles." The allocation of a portion of the gain on sale falls within the auspices of the policy established by that statute. **State of N.C. ex rel. Utils. Comm'n v. Carolina Water Serv., Inc. of N.C., 120.**

**Sale of water system—allocation of gain—Commission's policy—not arbitrary as applied—**The Utilities Commission's application of its policy concerning gain from the sale of water systems, even when compared with the Commission's contrary decision in a different case on the same day, was carefully considered, the result of reasoned judgment, and not arbitrary and capricious as applied. **State of N.C. ex rel. Utils. Comm'n v. Carolina Water Serv., Inc. of N.C., 120.**

**Sale of water system—allocation of gain—due process and equal protection rights of utility—not violated—**The Utilities Commission's order allocating the gain from the sale of a water system was based on reasoned decision making, and was neither arbitrary and capricious nor lacking a legitimate government purpose. Neither the utility's due process nor equal protection rights were violated. **State of N.C. ex rel. Utils. Comm'n v. Carolina Water Serv., Inc. of N.C., 120.**

**Sale of water system—allocation of gain—findings—**Where the City of Charlotte annexed property and Charlotte-Mecklenburg Utilities ("CMU") took over an existing water system (Carolina Water Service, Inc. of North Carolina (CWSNC)), the Utilities Commission's findings were supported by competent, material, and substantial evidence and justified the Commission's conclusion to allocate an estimated \$3.36 million of the gain on sale to CWSNC's remaining ratepayers. A decision of the Commission is presumed to be just and reasonable and the evidence relied on by the Commission in this case was comprehensive, thorough, well thought out, based on the testimony of witnesses for the Public Staff as well as the Utility, and supported by precise data concerning the nature of the transfer. **State of N.C. ex rel. Utils. Comm'n v. Carolina Water Serv., Inc. of N.C., 120.**

**Sale of water system—allocation of gain—not confiscation of property—**The Utilities Commission's allocation of a portion of the gain on the sale of a water system did not constitute a confiscation of property without just compensation in violation of Article I, section 19, of the North Carolina Constitution. Although the utility argued that it held vested rights because of its reliance during contracting on the Commission's longstanding policy, the Commission is empowered by the legislature to regulate utilities and, with that, allocate a portion of the gain on sale to either the utility or its ratepayers. The merits of the Commission's policy were not commented upon beyond a police power review that found no constitutional violation. **State of N.C. ex rel. Utils. Comm'n v. Carolina Water Serv., Inc. of N.C., 120.**

## WITNESSES

**Expert—family therapist—indecent liberties prosecution**—The trial court did not err in an indecent liberties prosecution by allowing a family therapist to testify as an expert where she clearly had the necessary qualifications and defendant did not demonstrate that her methods were unreliable. **State v. Dew, 750.**

**Treating physician—lay witness—not required to be admitted as expert**—The trial court did not abuse its discretion in a wrongful death case by concluding that the testimony of decedent's treating physician was permissible even though the doctor had not been admitted as an expert. A treating physician in a medical malpractice action who testifies regarding the care rendered to a patient does not testify as an expert, but as a lay witness. Defendant was not required to tender the treating physician as an expert witness. **Manning v. Anagnost, 576.**

## WORKERS' COMPENSATION

**Compensability—wrist injury—catching frozen package**—A workers' compensation award arising from a hand injury sustained in an effort to catch a large package of frozen bison meat that had slipped was affirmed. The evidence supported the Commission's findings, which in turn supported its conclusions of law with respect to compensability. Plaintiff was not required to present expert testimony in order to make the necessary showing of a causal link between the injury, during which her wrist "popped," and her immediate wrist pain. However, the record contained expert opinion evidence describing the relationship between plaintiff's work-related injury and her subsequent wrist pain. Finally, even if her twenty-year-old pre-existing carpal tunnel syndrome contributed to the pain, that fact would not render her injury noncompensable. **McCrary v. King Bio. Inc., 378.**

**Directing medical treatment—discretion of Commission**—The Industrial Commission did not abuse its discretion in a workers' compensation case by approving Dr. Lane as plaintiff worker's treating physician. Approval of an employee-selected physician is left to the sound discretion of the Commission. **Yingling v. Bank of Am., 820.**

**Form 60 admission of liability—unilateral mistake—no relief**—Defendants forfeited the ability to challenge their responsibility for paying plaintiff workers' compensation benefits by filing a Form 60. In doing so, defendants admitted the compensability of plaintiff's claim and their liability for making the necessary benefit payments, so that the basis for relief was a claim of unilateral mistake. An employer or carrier is not entitled to relief from a Form 60 based solely upon the fact that the party making the filing failed to adequately investigate all relevant issues before conceding compensability or liability. **Spivey v. Wright's Roofing, 106.**

**Injury—aggravation of pre-existing condition**—The Industrial Commission did not err in a workers' compensation case by concluding that plaintiff worker's 2008 injury was compensable. Dr. Lane's testimony, which the Full Commission found credible and relied upon, was competent evidence that supported the finding that plaintiff's 2008 injury materially aggravated his pre-existing condition. **Yingling v. Bank of Am., 820.**

**Injury—written notice—reasonable excuse for delay—no prejudice**—The Industrial Commission did not err in a workers' compensation case by concluding that that plaintiff worker's 2006 injury was compensable. The findings supported the

**WORKERS' COMPENSATION—Continued**

conclusion that plaintiff had a reasonable excuse for delay in filing written notice and defendant was not prejudiced by the delay. **Yingling v. Bank of Am., 820.**

**Special employee—summary judgment improper**—The trial court erred in a wrongful death case by granting summary judgment to defendant Brinley's Grading based on the exclusivity provision of the Workers' Compensation Act under N.C.G.S. § 97-10.1. The evidence in the record gave rise to genuine issues of material fact regarding whether decedent, who was actually employed by a company other than Brinley's Grading, amounted to a "special employee" subject to the Workers' Compensation Act's exclusivity provision. **Taft v. Brinley's Grading Servs., Inc., 502.**

**Uninsured employer—subcontractor—coverage previously carried**—The Industrial Commission did not err by failing to hold Boyet Builders, a contractor, liable for plaintiff's workers' compensation benefits under N.C.G.S. § 97-19 on the grounds that plaintiff was employed by a subcontractor that did not obtain workers' compensation coverage. It was held elsewhere in the opinion that the carrier for plaintiff's immediate employer was liable for plaintiff's workers' compensation benefits. **Spivey v. Wright's Roofing, 106.**

**Weekly disability compensation rate—misapprehension of law—insufficient findings of fact**—The Industrial Commission erred in a workers' compensation case by failing to consider the potential relevance of N.C.G.S. § 97-34 in determining plaintiff's weekly disability compensation rate and as a result, failed to make sufficient findings of fact to permit the Court of Appeals to determine whether the Commission awarded plaintiff the correct amount of compensation. The case was remanded for further proceedings. **Helfrich v. Coca-Cola Bottling Co. Consol., 701.**

**WRONGFUL DEATH**

**Police officer conduct—gross negligence**—The trial court erred in a wrongful death action by denying defendant city's motion for summary judgment. The police officer's conduct did not rise to the level of gross negligence per N.C.G.S. § 20-145. **Greene v. City of Greenville, 24.**

**Vicarious liability—negligence—scope of employment**—The trial court erred in a wrongful death case by granting summary judgment to defendant Brinley's Grading on the issue of its vicarious liability for any negligence by defendant Dominguez. The evidence tended to show that Dominguez was acting within the scope of his employment and in furtherance of Brinley's Grading's business when the alleged negligence occurred, and evidence that Dominguez was forbidden from starting or otherwise operating the truck involved in the accident would not necessarily remove Dominguez from the course and scope of employment. **Taft v. Brinley's Grading Servs., Inc., 502.**

**Workers' Compensation Act—exclusivity provisions—employers protected**—The trial court did not err in finding that defendants Wal-Mart East and Wal-Mart Stores Inc. were protected by the exclusivity of remedy provision contained within the Workers' Compensation Act. East and Stores Inc. directly manage and supervise employees hired by Wal-Mart Associates and thus are afforded protection under the Act. **Pender v. Lambert, 390.**

**WRONGFUL DEATH—Continued**

**Workers' Compensation Act—exclusivity provisions—Pleasant exception—inapplicable**—The trial court did not err in a wrongful death action by granting defendants' motion to dismiss. The *Pleasant* exception to the exclusivity provisions of the Workers' Compensation Act did not apply where defendant Respass' conduct did not rise to the level of willful, wanton, or reckless behavior. **Pender v. Lambert, 390.**

**Workers' Compensation Act—exclusivity provisions—Woodson exception—inapplicable**—The trial court did not err in a wrongful death action by granting defendant Wal-Mart Associates' motion to dismiss. The record did not reflect any employer misconduct and the *Woodson* exception to the exclusivity provisions of the Workers' Compensation Act was inapplicable. **Pender v. Lambert, 390.**

**ZONING**

**Outdoor advertising sign—unlisted use—discretionary decision**—The Planning Director's discretionary decision in a zoning case to not approve petitioner's outdoor advertising sign as an "unlisted use" under LDO § 12.3.1(C)(1) was not error because the Planning Director was not required to do so. **Fairway Outdoor Adver. v. Town of Cary, 676.**

